

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA

No. 9338

493

PEOPLES BANK,

Appellant,

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST A. DRAPER and RUDOLPH M.
EVANS,

Appellees.

**Appeal from final order of dismissal of the District
Court of the United States for the District of Columbia.**

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**United States Court of Appeals
for the District of Columbia**

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9338

PEOPLES BANK,

Plaintiff-Appellant,

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST A. DRAPER and RUDOLPH M.
EVANS,

Defendants-Appellees.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

The jurisdiction of the court below was based upon: Constitution of the United States, Article I, Sections 1 and 8, and the Fifth Amendment; the Declaratory Judgment Act, 28 U. S. C. §400¹; the Federal Reserve Act, §9, 12 U. S. C. §§321 to 328, inclusive²; the federal deposit insurance provisions of the Federal Reserve Act, §12B, 12 U. S. C. §264³. The basis of jurisdiction in this Court is that the appeal is from a final order entered in the District Court of the United States for the District of Columbia. 27 Stat. 435 (Dist. of Col. Code 17-101).

1 Statutory Appendix, pp. A-31 to 32.

2 Statutory Appendix, pp. A-7 to A-12.

3 Statutory Appendix, pp. A-1 to A-6.

Statement of Case.

This is an action for a declaratory judgment and incidental injunctive relief. The plaintiff is a California state banking corporation (App. 2)⁴. The defendants, who are sued as individuals, were members of the Board of Governors of the Federal Reserve System when the suit was begun (App. 3).

By final order filed June 6, 1946 (App. 118), the United States District Court for the District of Columbia, on an opinion by Justice Bailey (App. 113-117), granted defendants' motion for judgment dismissing the complaint and denied plaintiff's motion for summary judgment. By the same order the court also dismissed the complaint as to the defendant McKee on the additional ground that he had ceased to be a member of the Board of Governors. Plaintiff appeals (App. 118-119).

By its complaint (App. 2-9) the plaintiff, pursuant to the provisions of 28 U. S. C. §400⁵, seeks a declaratory judgment to the effect that Condition No. 4 attached to its permit to become a member of the Federal Reserve System is invalid. Condition No. 4 reads as follows (App. 4) :

"If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such

⁴ This and similar references are to pages of Joint Appendix.

⁵ Statutory Appendix, pp. A-31 to A-32.

bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

The complaint alleges, and the answer necessarily admits, that Transamerica Corporation has completed the act which, according to the condition, *but not according to the statute* (12 U. S. C. §327)⁶, works a forfeiture of the plaintiff's membership in the Reserve System (par. XI; App. 6). This proceeding is brought to determine whether that constitutes a legal ground of forfeiture. Plaintiff seeks a declaratory judgment which will remove the continuing threat to which it is now subject.

The opinion below expresses the view that even if the condition is ^{not} valid,—even if this government agency were utterly without authority to impose such a condition—this plaintiff *accepted* the permit to which it was attached and thereby "estopped" itself ever to complain of the illegal imposition. In other words, according to the opinion below, if a government regulatory agent can once obtain the acquiescence of a citizen in the agent's exercise of an asserted power, that citizen is forever barred from questioning the agent's right to exercise the assumed power or further powers predicated thereon, no matter what the consequences.

We challenge that opinion. We deny the validity of any such doctrine of government by usurpation. We ask this court to reverse the decision below and grant summary judgment in favor of the plaintiff as prayed in the complaint.

(a) History of the Litigation.

In 1944, immediately after the plaintiff bank learned of the acquisition of 500 shares of its stock by Transamerica

⁶ Statutory Appendix, p. A-11.

Corporation, it commenced suit in the United States District Court for the Northern District of California, Southern Division (Complaint, par. XI, App. 6; Parker Aff., App. 32). That suit was dismissed upon jurisdictional grounds.

Peoples Bank v. Federal Reserve Bank of San Francisco, et al., 58 F. Supp. 25 (N. D. Cal. S. D., 1944); appeal dismissed 149 F. 2d 850 (C. C. A. 9th, 1945).

That case was brought against the Federal Reserve Bank of San Francisco, Henry F. Grady, as Federal Reserve Agent, and the "Board of Governors of the Federal Reserve System" sued as an entity.

After such dismissal, a formal demand for the cancellation of Condition No. 4 was made upon the Board of Governors on December 4, 1945, but was not complied with (Complaint, par. XIV, App. 7). This action was commenced on December 24, 1945.

Defendants moved to dismiss the complaint in this action on the ground that there is not a justiciable controversy between the parties (App. 10). That motion was denied by Judge Holtzoff of the United States District Court for the District of Columbia upon a carefully considered opinion filed on March 14, 1946, and reported in 64 F. Supp. 811; also in this record (App. 11-23). The learned Judge said in part (App. 20-21):

" * * * it is clear that a justiciable controversy exists in the instant case, warranting recourse to an action for a declaratory judgment. One of the conditions on which the plaintiff was admitted to membership in the Federal Reserve System, was that on demand of the Board of Governors, the plaintiff would withdraw from the System if any of its shares of stock were acquired by the Transamerica Corporation, or any of its subsidiaries or affiliates. Supervening events have created a situ-

ation enabling the defendants to invoke this condition. The plaintiff claims that the condition is ultra vires and illegal, and has made a demand on the Board of Governors for its cancellation. The Board maintains the validity of the condition. In fact, counsel for the defendants, with commendable candor and disarming emphasis, so admitted in open court on the argument of this motion. In view of events that have transpired, the condition hangs over the bank like the sword of Damocles ready to strike whenever the Board of Governors chooses to wield the weapon at its command. In the words of Mr. Justice Douglas in *Altwater v. Freeman*, 319 U. S. 359, 365, 63 S. Ct. 1115, 1118, 87 L. Ed. 1450, 'It was the function of the Declaratory Judgments Act to afford relief against such peril and insecurity.'

"The plaintiff is not seeking an answer to a hypothetical question, or a solution of a theoretical or abstract problem. In making its future plans and in protecting its business, it is essential from the standpoint of the plaintiff that the validity of the condition be adjudicated. Failure to enforce the condition thus far, would hardly estop or preclude the defendants or their successors from doing so at some future time. To say that no actual controversy exists between the parties is not realistic.

" * * * It seems desirable as a matter of orderly administration and substantial justice that such a determination be had at an early stage of the controversy. It does not seem to the court that a governmental or quasi-governmental agency should interpose obstacles or place obstructions in the way of an early judicial determination of the validity of its potential actions, if their legality is challenged by a party subject to them."

After that decision the defendants filed their answer (App. 23-24), admitting by failure to deny [F. R. C. P., Rule 8(d)]⁷ each and every allegation of the complaint, and moved for judgment on the pleadings (App. 25). Plaintiff moved for summary judgment (App. 25-27) supported by affidavits and exhibits (App. 28-110) presenting the documentary background of the plaintiff's allegations. In this state of the record the Court, relieved of any need for deciding issues of fact, was in a position to make a final determination on the merits as to the validity or invalidity of Condition No. 4. The Court below, however, avoided deciding the justiciable controversy which involved the question of illegality and upheld the defendants' further obstructive contention that "the plaintiff is not in a position to raise this question"—that "plaintiff cannot now attack the validity of the condition * * *" (App. 115, 117).

(b) The factual background as disclosed by the Pleadings, Affidavits and Documentary Exhibits attached.

The facts surrounding the application by Peoples Bank for membership in the Federal Reserve System and the position taken by the defendants with respect to that application are set forth in the affidavit, sworn to April 4, 1946, of W. M. Parker, who has been the secretary of the bank since the time of its organization (App. 28-33). It appears from that affidavit and the documents annexed to it (Exhs. 1 to 12, inclusive, App. 33-61) that the organization of the plaintiff bank was begun in the fall of the year 1941; that the California Superintendent of Banks made an investigation which satisfied him that the public convenience and advantage would be promoted by the establishment of a new bank in the proposed location; that he granted the requisite permission, stating, however, that his commitment was

⁷ Statutory Appendix, p. A-32.

"based on the condition that you will have obtained Federal Deposit Insurance which shall be effective concurrently with your opening for business" (Exh. 2, App. 35-36).

There were two ways prescribed by law for a state bank to obtain Federal Deposit Insurance: (1) by direct application to the Federal Deposit Insurance Corporation; and (2) by an application for membership in the Federal Reserve System, which, under the law, automatically carried with it Federal Deposit Insurance. It appears that the organizers of the plaintiff bank chose membership in the Federal Reserve System as their method of satisfying the essential requirement of Federal Deposit Insurance, thus obtaining at the same time the advantages of the Reserve System.

The application for membership in the Federal Reserve System on the usual printed form was forwarded under date of November 28, 1941 (Exhs. 4 and 5, App. 40-48). It bore the certificate in usual form of counsel for the Federal Reserve Bank of San Francisco as to its legal sufficiency (App. 47-48). The bank was by that date already incorporated, had its capital raised, its location rented, its stationery printed, was in process of being equipped, and the parties interested expressed themselves as "very, very anxious for the bank to open at the earliest possible date, in order to take advantage of, amongst other things, the transfer of savings funds and holiday deposits which are certain to be available" (Exh. 4, App. 41). Nothing was heard from the defendants, however, until February, 1942.

The complaint alleges (par. V) and the answer necessarily admits that in November, 1941, when its application for membership was submitted, plaintiff was in all respects qualified and eligible for membership in the Federal Reserve System, and that its application for such membership was

made pursuant to the prescribed rules and regulations. The plaintiff's eligibility otherwise appears from the very fact that it was admitted to membership subject to no condition whatsoever relating to the perfecting of its eligibility. Even the erroneous hypothesis upon the basis on which Mr. Justice Bailey finds a possible so-called "discretion" implies the eligibility of the bank, for the Justice suggests only later circumstances which might invoke such "discretion".

Notwithstanding the Bank's eligibility, under date of February 14, 1942, Mr. Chester Morrill, Secretary of the Board of Governors, wrote to Mr. W. A. Day, President of the Federal Reserve Bank of San Francisco, a letter advising that the Board "is unwilling to approve the application on the basis of the information now before it" (Exh. 6, App. 49).

This cryptic denial was personally investigated in Washington by Mr. John S. Griffith, a shareholder and director of the plaintiff bank, and his affidavit, sworn to April 4, 1946, sets forth the substance of his conversation there with the defendant McKee and one other member of the Board and with the Secretary of the Board. Mr. Griffith was there informed:

"that upon assurances that the Peoples Bank was independent of Bank of America and Transamerica Corporation the Board might be disposed to reconsider the application" (App. 62).

The plaintiff bank immediately filed an application for reconsideration under date of February 20, 1942 (Exh. 8, App. 50-51). On March 11, 1942 the Board formally disclosed to the plaintiff bank its requirement of assurances that Transamerica had no interest in the plaintiff and that plaintiff's stockholders had no agreement or intention to sell their stock to Transamerica or to any bank holding company (Exh. 10, App. 53-54). The plaintiff bank and all of its stockholders complied on April 23, 1942 by giving the

assurances demanded (Exh. 11, App. 54-58). An examination of Exhibit 11 reveals that the stockholders of plaintiff *did not consent* to the imposition of Condition No. 4. Indeed, they were not requested to consent. Each of them simply signed a letter reading as follows:

"I, the undersigned, being a stockholder of the Peoples Bank, Lakewood Village, California, do hereby state that I have no arrangements, expressed or implied, with respect to the sale or transfer of the stock of the Bank which I own to either the Transamerica Corporation, or any organization affiliated or closely identified with Transamerica Corporation, or any other Bank Holding Company group, and that I do not intend to enter into any such agreements or understandings" (Exh. 11, App. 58).

There is not the slightest suggestion in this record that the representations of fact and of present intention so made by plaintiff's stockholders were inaccurate in any respect.

The Board of Governors then approved the application for membership by a letter dated May 6, 1942 (Complaint, par. VI, Exh. 12, App. 58-61). *The complaint alleges (par. VII) and the answer necessarily admits that in considering and approving plaintiff's application the Board took into consideration all factors prescribed by statute and found plaintiff fully qualified and eligible.* The complaint further alleges (par. VIII), without denial by the answer, that notwithstanding said findings, defendants, purporting to act officially but acting in excess of their lawful powers, purported to subject plaintiff's membership to Condition No. 4 hereinabove quoted (p. 2, *supra*).

The Board of Governors' letter of May 6, 1942 (App. 59) stated four conditions prescribed by the defendants, the first three of which were the standard conditions set forth in the Board's Regulation H, section 6. Those standard

conditions are simply a paraphrase of the requirements of the statute and place no restrictions upon the conduct of the member bank other than those that the statute itself requires. In the case of this bank, however, Condition No. 4 hereinabove quoted (*supra*, p. 2) was added.

It will be remembered that five months had elapsed since the bank was completely ready to open for business and "very, very anxious" to do so. It had no economic alternative at that time but to open its doors under the shadow of this unprecedented restriction, which it will be noted is much broader than the commitment of the shareholders, and hope that no occasion would arise in which the Board could invoke it. It also had every reason to expect, at the time when the condition was accepted, that if it should ever be given notice to withdraw from the Federal Reserve System by the invocation of Condition No. 4, it would at least be able to obtain Federal Deposit Insurance by a direct application as a non-member state bank, and would not be wholly prevented from pursuing its chartered purposes (Parker aff., App. 31-32). It will be noted that the defendants and their representatives carefully avoided disclosing to the plaintiff in these prolonged negotiations that they had already agreed with the Federal Deposit Insurance Corporation that the latter would refuse to insure it if it should "withdraw from the Federal Reserve System". That disclosure was first made by the defendant Eccles in a letter to Mr. A. P. Giannini, Chairman of the Board of Transamerica Corporation, on November 13, 1942 (Andrews aff., App. 65; Exh. 19, App. 83), and was not made known to the plaintiff bank until March 24, 1944, nearly two years after the original imposition of the condition (Parker aff., App. 32; Brewer aff., App. 107).

Unfortunately for the plaintiff bank,—in that this lawsuit was thereby made necessary—plaintiff was wholly with-

out power to prevent its stockholders from selling stock owned by them to any person or corporation they saw fit, and they had not even been called upon to restrict their right to do so. The complaint alleges (par. X) without denial by the answer that plaintiff has no power of control over the dealings of its stockholders with their stock, and hence was utterly without power to prevent a violation of Condition No. 4. No matter what plaintiff bank did, no matter how much it might have desired to avoid conflict with the defendants concerning their anti-Transamerica "policy", plaintiff realized for the first time on March 24, 1944 that if this Condition No. 4 were not adjudged illegal, plaintiff's very existence might be terminated at any time at the whim of these defendants,—all because Transamerica Corporation had bought 500 (out of a total of 5,000) of the outstanding shares of plaintiff's capital stock (Compl., pars. XI, XII and XIII). Accordingly on that day plaintiff's Board of Directors authorized the institution of legal proceedings to determine the legal effect of Condition No. 4 (Parker aff., App. 32).

The complaint alleges that Condition No. 4 was and is "arbitrary, unreasonable, capricious, discriminatory, *ultra vires* the authority of the Board, null and void", etc. It further alleges that any action taken pursuant to said void Condition No. 4 would constitute a taking of plaintiff's property without due process of law (par. IX). Certainly, the allegations as to the arbitrary and discriminatory character of Condition No. 4 are allegations of fact which are admitted by the answer. Moreover, the facts in the record show this beyond any question.

The complaint further alleges and the answer necessarily admits that the termination of plaintiff's membership in the Federal Reserve System would cause plaintiff to lose its status as an insured bank, and "such loss would render the

plaintiff unable lawfully and advantageously to pursue its functions as a bank and to conduct its operations to the advantage of its stockholders and the public served by it under supervision according to law" (par. X).

The documentary evidence annexed to the affidavits submitted by the plaintiff also shows the circumstances in which the defendants' anti-Transamerica "policy" was developed. No pretense was made that it represented the Congressional intent. No claim was made that the defendants had any legal right to stop the expansion or prevent the further investment in bank stocks by Transamerica Corporation. No suggestion is made that either the plaintiff bank or Transamerica Corporation or anybody else affected by the so-called "policy" was given any opportunity to attend any administrative hearing or otherwise to be heard as to the desirability of such "policy" in the public interest (Andrews aff., App. 66-67). Indeed it is not suggested that the phrase—"in the public interest"—even appears anywhere in the Federal Reserve Act. Instead, we have the bald admission by these defendants and their representatives that they, in secret meeting with the Comptroller of the Currency and the Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, unanimously agreed that they should

"under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group" (Exh. 14, App. 69-70),

and that the Federal Deposit Insurance Corporation should decline

"to insure any newly organized state nonmember bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System" (Exh. 19, App. 84).

The defendant Eccles, Mr. Leo T. Crowley, who was then Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and other spokesmen for the defendants have admitted time and again in testimony before Congressional Committees and other public records, despite implications to the contrary in Condition No. 4 that they do not under the existing law possess any power to restrict the expansion of bank holding companies; and the Congress, although aware of this condition and of the defendants' desire for such power, has steadfastly refused to enact any legislation designed to confer such power (Andrews aff., App. 67-68; Exhs. 24, 25, 26, 27 and 28, App. 96-103).

The imposition of Condition No. 4 upon the Peoples Bank permit was part and parcel of this anti-Transamerica "policy". This is apparent not only from the wording of Condition No. 4 but from the circumstance that the letter from the Board of Governors denying the original Peoples Bank application for membership was written on the same day and signed by the same man as the letter to Transamerica Corporation announcing the adoption of the "policy" of declining permission to Transamerica to acquire "any substantial interest" in banks (Andrews aff., App. 63-64; Exh. 14, App. 69-70).

The correspondence annexed to the Andrews affidavit (Exhs. 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, App. 69-96) shows eloquently on its face the character of the prejudice in which Condition No. 4 and the entire anti-Transamerica "policy" were conceived. Indeed, the correspondence shows more than that. It contains one labored effort after another by the defendant Eccles to state arguments which might indicate that such a "policy" would be in the public interest, and it shows that each such effort was answered with a recital of facts,—indisputable facts generally based on official statements and reports—which foreclosed the possibility of

a plausible answer. And all the while, it was conceded by the defendants that the Congress,—the only body vested by the Constitution with a lawful right to declare such a policy, assuming it to be in the public interest, had turned a deaf ear to the pleas of the defendants and their co-conspirators to pass a law authorizing the enforcement of their "policy".

Defendants may be expected to attempt in this Court to repeat their successful effort in the Court below to divert the attention of the learned Justice from the conspiratorial character of defendants' actions, which are the subject of this complaint, by a recital of the noble motives and generally praiseworthy endeavors of the Reserve Board in otherwise performing its lawful functions within the scope of its statutory authority. This Court, however, must not be so diverted. Plaintiff's right to continued existence and the right of the public in Lakewood Village, California, to continued banking service, unimpaired by baseless official threats, depend upon this Court's willingness to condemn an unlawful act, uninfluenced by commendable but irrelevant accomplishments of the defendants and their predecessors in other circumstances.

The final evidence that Condition No. 4 was imposed on the plaintiff in an endeavor to effectuate a policy of discrimination, applicable with special violence to the plaintiff but founded in the official dislike for Transamerica Corporation, is referred to in the Ponsford affidavit (App. 103-106). That affidavit, summarizing official publications of the Board of Governors of the Federal Reserve System, shows that at or subsequent to the time of admission of Peoples Bank to membership in the Federal Reserve System, five state banks—two in Montana and three in Minnesota—have been admitted to membership, although affiliated with Northwest Bancorporation, a bank holding company. It also discloses that since the date of admission of Peoples Bank to the

Reserve System there have been admitted to such system four California state banks, one of which has recently been absorbed by the American Trust Company of San Francisco, a state member bank operating a large branch banking system. It further appears that the American Trust Company has actually been authorized by the Board of Governors of the Federal Reserve System to operate a branch at the location of said absorbed bank.

The official records of the Board of Governors of the Federal Reserve System, which are not available to the plaintiff without discovery, could disclose whether any condition comparable to Condition No. 4 has been imposed upon any of the other nine institutions mentioned. In the absence of any such disclosure or any denial of the allegations, and in view of the facts in this record, the charge of discrimination is clearly established as an undisputed fact.

The present injury and continuing embarrassment to the plaintiff bank of Condition No. 4 and the nature and extent of its interference with the normal conduct of plaintiff's business,—including the impairment of plaintiff's ability to compete with other banks freely and on a basis of equality—are readily apparent from a reading of the condition. Such effects are strongly corroborated by the affidavits of Mr. Brewer, the President of plaintiff bank (App. 106-108), and of Mr. Luddy, a stockholder and director, who purchased his stock without knowledge of the existence of Condition No. 4 (App. 109-110). Indeed, the existence of a legal injury, assuming the invalidity of Condition No. 4, has already been determined in the decision of Judge Holtzoff confirming the existence of a justiciable controversy (see quotation from opinion, *supra*, pp. 4-5).

Statement of Points.

I. The court below erred in holding the doctrine of equitable estoppel applicable to this case.

II. Government agencies are in no better position than private parties to invoke the doctrine of estoppel as a cloak for illegal usurpation of authority.

III. The facts do not support estoppel.

IV. Defendants have admitted officially that they had no right to impose a restriction such as Condition No. 4.

V. Unsound banking policies not involved.

VI. The power of the Board to attach conditions to membership in the Reserve System is limited by statute and the Board has no discretion to exceed such limits. This conclusion is emphasized by the statutory history of the Federal Reserve Act.

VII. Any condition or regulation imposed in excess of statutory power is void. The statute does not authorize the Board of Governors to make "contracts" with applicants for admission as to the circumstances in which they will withdraw.

VIII. The statute prescribes with considerable particularity the factors to be considered by the Board in passing upon an application under Sec. 321. The Board, in passing upon a state bank's application, has no authority to "consider" whether its stock is then or may thereafter be held by a holding company.

IX. Not only is there no authority in the statute for Condition No. 4, but it is in direct conflict with several provisions of the statute.

X. Not only is the condition invalid for complete lack of authority to impose any condition of that character and for that purpose, but it is also invalid because arbitrary, unreasonable and unjust and because it is discriminatory.

XI. If the statute be construed as authorizing the Board to prescribe Condition No. 4, the statute would be unconstitutional as involving a delegation of a legislative power vested in Congress alone under Section 1 of Article I of the Constitution, also in contravention of the delegation of legislative power to Congress in specific instances enumerated in Section 8 of Article I. Such exercise of power by the defendants is likewise unconstitutional as being in violation of the Fifth Amendment of the Constitution.

XII. The defendant McKee's motion to dismiss as to him should have been denied.

Summary of Argument.

A. The indisputable and undisputed facts clearly show that the plaintiff bank, through the imposition of a so-called condition of membership, is unwittingly made the chosen instrument of the defendants in an unprecedented effort to exercise a power which, by their own later confession, is non-existent—a power to restrict and supervise the investment of one corporation in bank stock. They show that this restriction has been attempted without any proceedings having been taken with respect to such corporation pursuant to any law. They show that such power, whenever asserted, has been consistently denied by the corporation; that it has also been withheld by the Congress of the United States. They further show that the defendants concealed from the plaintiff, at the time of its admission to membership in the Reserve System the secret plan of the defendants and others to aggravate the plaintiff's unfortunate position through an extra legal commitment of the Federal Deposit Insurance Corporation for non-insurance. It is on this record that defendants have asserted and the lower court has sustained an estoppel against the plaintiff to prevent it from obtaining a declaration of its rights with respect to the condition in question.

B. The court below erred in applying a doctrine of estoppel. The essential ingredients of estoppel are *not* present. Plaintiff is not even accused of any misrepresentation. Defendants do not claim to have taken any action in reliance upon *any* representation by plaintiff. There can be no conceivable detriment to the defendants from granting plaintiff's plea that its statutory right to continued Federal Reserve membership, free of discriminatory conditions, be judicially declared.

C. Estoppel cannot be claimed by one who has taken only such action as he was legally obligated to take. The defendants were legally obligated to admit to full Federal Reserve membership any bank which, under the statutory tests, was qualified and eligible.

D. "Acceptance" by the plaintiff of the conditions imposed by defendants was an essential step to put plaintiff in a position to attack the validity of one which was unlawful. Estoppel is applied only to prevent injustice. It would not prevent injustice to hold a party estopped to attack a condition subsequent, unlawfully imposed upon a status which he is entitled to retain unconditionally,—especially where, as here, the victim of such imposition has protested promptly and sought an adjudication of its rights.

E. Plaintiff's "acceptance" of Condition No. 4 added nothing to its validity. Federal Reserve membership is not legally subject to contract. If the statutes give defendants no right to *impose* a contingent obligation to withdraw, then a *contract* to do so has no legal basis; if the *obligation is imposed* by statute, a contract to obey the law adds nothing to the existing legal obligation to do so.

F. The statutes do not authorize imposition of any such restrictive condition upon any bank. The defendants have repeatedly and officially admitted this. There is strong evidence of Congressional intent that the Reserve Board should not have any such power.

G. The Federal Reserve Act should be interpreted in such a manner as to avoid conflict with the Constitution. Such interpretation supports plaintiff's contention.

H. The defendant McKee, like the other defendants, and to a greater extent, was a party to the action sought to be declared invalid. The decree should run against all of the parties.

I. The record shows that the condition was imposed as a part of a conspiracy, concealed from the plaintiff at the time of its admission, to penalize and restrict the expansion of Transamerica Corporation in a manner not authorized by law. A declaratory judgment of this Court is required to prevent a perversion of the legitimate and wholesome aims of the Federal Reserve Act by such an abuse.

POINT I.

The Court below erred in holding the doctrine of equitable estoppel applicable to this case.

Since the learned Court below has held that the right of this plaintiff to defend its very existence has been foreclosed by the doctrine of equitable estoppel applied in favor of a government regulatory agency, it is fitting at the outset to consider what factors give rise to an equitable estoppel and what evidence of such factors appears in this record. A leading textwriter (3 Pomeroy, Equity Jurisprudence (5th ed. 1941)) lists six "essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications." In §805 these six essential elements are stated as follows:

"1. *There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.* 2. These facts must be known to the party estopped at the time of his said conduct, or at

least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him*. 4. The conduct must be done with the intention, or at least with the *expectation*, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply *impossible* to ascribe any *intention* or even *expectation* to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such manner as to change his position for the worse; in other words, *he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.*" [Italics ours in part.]

Obviously basic among these elements are the first and the last. The others are mere corollaries. But without a misrepresentation—without detrimental reliance—application of a doctrine of equitable estoppel is untenable. See *Ketchum v. Duncan*, 96 U. S. 659, 666, 24 L. Ed. 868; *Hammond v. Tate*, 83 F. 2d 69, 72 (C. C. A. 10th, 1936). We challenge the defendants to point out a scintilla of evidence in this record of any misrepresentations by the plaintiff or anyone in its behalf. We further challenge the defendants to point out any loss or detriment that they would suffer if compelled to alter what they have done on the basis of the defendants' *truthful* representations. It is undisputed that the plaintiff was and is qualified for membership in the

Federal Reserve System. Can it be seriously suggested that the defendants or anyone they represent can suffer a legal or equitable detriment by being compelled to recognize that which it is their duty under the law to recognize?

The conclusion that equitable estoppel has no application in such circumstances is so abundantly supported by authority that it can hardly be necessary to set forth more than a few references. For example:

“ * * * The doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do.”

31 Corpus Juris Secundum (1942), Estoppel, §72, p. 276.

“The cases all agree there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action.

“Finally this action must be of such a nature that it would have altered the *legal* position of the party for the worse, unless the estoppel is enforced.” [Italics ours.]

3 Pomeroy, Equity Jurisprudence (5th ed. 1941), §812 (citing numerous cases).

“Furthermore the doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do.”

21 Corpus Juris (1920), Estoppel, §134(f), p. 1135.

“Estoppel does not arise where the person accepting the benefits is entitled thereto, regardless of the questioned transaction.”

Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc., 116 F. 2d 823, 836 (C. C. A., 6th, 1941).

We have heretofore pointed out that plaintiff's qualification and eligibility for membership in the Federal Reserve System have been admitted by these defendants (Compl., par. V, not denied by answer); and that in considering and approving plaintiff's application the Board of Governors took into consideration all factors prescribed by statute (Compl., par. VII, not denied by answer). It follows that plaintiff was entitled to admission to the Federal Reserve System and all the benefits thereof without discriminatory conditions. That this Court should, for reasons of equity and good conscience, hold plaintiff estopped to claim such benefits in such circumstances is unthinkable.

The absurdity of invoking equitable estoppel here is further illustrated by considering the consequences of a doctrine stated by the Supreme Court in *Utah Power & Light Company v. United States*, 243 U. S. 389, 410, 37 Sup. Ct. 387: An applicant for a government license must appropriately offer to conform to all conditions lawfully imposed by the licensing authority before he has a legal right to complain that some of the conditions are invalid. What a travesty it would be to hold on the one hand that an applicant for a license cannot complain of the invalidity of one condition unless he agrees (in advance of an adjudication of illegality) to comply with "all lawful regulations", and on the other hand that if he so agrees to comply he is forever estopped to complain about any condition—lawful or unlawful. Yet that is the inevitable consequence of Mr. Justice Bailey's decision in the court below.

The doctrine of estoppel has been said to be applicable where it is the only means of avoiding "injustice". [American Law Institute, Restatement of the Law of Contracts (1932), p. 110, §90.] Use of estoppel to prevent a licensee from questioning the validity of a condition, to which he has agreed as the only means of putting himself in a position to question its validity, would hardly be a means of avoiding

injustice. It would be an open invitation to tyranny.

How then has the doctrine of estoppel been brought into this case? What material fact do the defendants or the court below claim was misrepresented or concealed? There is not any. The opinion below, the defendants' answer and all briefs filed by the defendants up to the present time will be searched in vain for the slightest suggestion that plaintiff misrepresented or concealed any material fact. The sole alleged basis for estoppel is stated in identical language in defendants' brief below and in Justice Bailey's opinion (App. 114), viz., "that plaintiff, *having enjoyed for almost four years the benefits of the Federal Reserve System membership, which resulted from its acceptance of Condition No. 4*, is now estopped from challenging the validity of such Condition."

Neither the defendants nor the learned Court below have cited any authority for the proposition that "enjoyment" for any period of time of a status for which one is admittedly fully qualified and unconditionally eligible affords any basis for estopping such person from contesting an attempt to deprive him of such status for an unlawful reason. A diligent search by us has failed to disclose any such authority. Yet we repeat the full qualification and eligibility of this plaintiff for Federal Reserve membership are unconditionally admitted in this case.

The nearest approach to an estoppel doctrine in the facts of this case is a so-called "promissory estoppel" although that term has not been used either by the defendants or by the court below. Promissory estoppel is the principle by which courts have upheld the validity of certain types of contracts without proof of consideration in the conventional sense. Indeed, in such cases the detrimental reliance by one party upon the promise of the other party has been said to operate as a "substitute for consideration" or as "the equivalent of consideration". *Allegheny College v. Na-*

tional Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927). "The gratuitous promises will thus be converted into valid and enforceable contracts." *School District v. Sheidley* (*School District v. Stocking*), 138 Mo. 672, 40 S. W. 656 (1897).

Illustrations of the situations to which this doctrine has been applied are:

Charitable subscriptions, which have been held enforceable, in spite of the original absence of consideration, if money has been expended or liabilities have been incurred in a reliance upon the promise so that non-fulfilment will cause injury to the payee.

Robinson v. Nutt, 185 Mass. 345, 70 N. E. 198 (1904);

University of Pennsylvania v. Coxe, 277 Pa. 512, 121 Atl. 314 (1923);

Board of Home Missions v. Manley, 129 Cal. App. 541, 19 Pac. 2d 21 (1933).

A promise not to take advantage of a statute of limitations which induces another to forego his rights and to delay suit until after the expiration of the period of limitation is held to estop the promisor from asserting the statute as a bar to the creditor's action.

Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512; *Chesapeake & N. R. Co. v. Speakman*, 114 Ky. 628, 71 S. W. 633 (1903);

W. B. Saunders Co. v. Galbraith, 40 Ohio App. 155, 178 N. E. 34 (1931).

The essential basis for the doctrine of promissory estoppel is the avoidance of "injustice". As stated by Williston [1 Williston, Contracts, (Rev. Ed. 1936), p. 502, §139]:

"There would seem, however, compelling reasons of justice for enforcing promises, where injustice cannot be otherwise avoided, when they have led the promisee to incur any substantial detriment on the faith of them, not

only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise."

And the real basis of the doctrine was well stated by the California court in *Bank of America v. Pacific Ready-Cut Homes, Inc.*, 122 Cal. App. 554, 10 Pac. 2d 478 (1932), where it was stated (10 Pac. 2d at 482):

"It is the general rule that, in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future. Promises as to future conduct or performance, if binding at all, must be binding as contracts."

The so-called "estoppel" defense then proves to be not a defense of "estoppel" at all. Its sole support is the admitted acceptance of Condition No. 4 by the plaintiff. Plaintiff agreed to the condition, of course. But that did not create an "estoppel". The most that can be said is that a contract resulted,—a contract whereby plaintiff promised contingently to surrender its Federal Reserve membership in consideration of defendants' performance of their legal obligation to grant such membership to an admittedly qualified and eligible bank.

Thus we are brought right back to the basic questions: Do we have the elements of an enforceable contract? Did the defendants have power to exact such a contract? Did the plaintiff have power to make such a contract validly? Will it avoid, or promote, "injustice" to compel this plaintiff to give up a valuable status for which it is admitted to be fully qualified and eligible?

The "estoppel" argument has not advanced us one inch toward the answers to those questions. It has merely distracted the court's attention temporarily from the real problem of illegality.

POINT II.

Government agencies are in no better position than private parties to invoke the doctrine of estoppel as a cloak for illegal usurpation of authority.

In support of their "estoppel" argument, the defendants cite a number of cases which hold that one who invokes the use and benefit of a statute may not thereafter attack its constitutionality.

We are not here seeking to question the constitutionality of the Federal Reserve Act. We seek to have the Act administered and applied as written. It is our specific contention that the imposition of Condition No. 4 was unwarranted by the statute and constituted an unauthorized assumption of power by the Board. It is only the latter that we wish to avoid.

The case of *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 282 U. S. 311, 51 Sup. Ct. 159, seems to bear the closest analogy to the situation involved in this case. The *St. Paul* case involved the validity of a condition imposed by the Interstate Commerce Commission incidental to the authority granted by it to the railroad company to issue securities to take over the assets of a corporation in receivership. The condition attempted to control the disbursement of reorganization expenses incurred by the old corporation in connection with the reorganization plan. The particular condition was held to be beyond the power of the Commission to impose, since it did not relate to the regulation of commerce. The government contended that since the railroad company had accepted the grant of authority to issue securities and had acted upon that grant, it could not question the validity of a condition which was a part of the grant. The Supreme Court, however, held otherwise and set aside the condition as invalid and enjoined its enforcement. In connection with the validity

of the condition, the court used the following language, which is particularly pertinent to this case (282 U. S. at p. 324) :

“By subdivision (3) of §20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard, *Union Bridge Co. v. United States*, 204 U. S. 364, 384-385) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities.”

The government's contention that the condition, though invalid, could not be set aside because the grant had been accepted and acted upon, is strikingly similar to the claim of estoppel asserted by the defendants here and was disposed of in the following language by the court in the *St. Paul* case (282 U. S. at p. 328) :

“The contention of the government is that the authority to enjoin an order in part, applies to a severable part of the order, but not to a condition upon which the order was issued after the carrier has exercised the authority granted by the order. No pertinent authority is cited in support of this contention, and none has been called to our attention. *A condition contained in the order by which the grant is limited is as much a part of the order as any of its substantive provisions, and if beyond the jurisdiction of the commission is not ratified by an acceptance of the valid part of the order.* It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess

the unqualified power to withhold the grant altogether, does not annul the grant. *The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant.*" (Italics ours.)

We have been unable to discover any case in which the holding in the *St. Paul* case, to the effect that the acceptance of a grant does not preclude the grantee from attacking the validity of conditions attached to the grant, has been criticized or questioned. There appears to be no later authority either for or against that proposition. The *St. Paul* decision is the only authority, as to the effect of an invalid condition upon an order to which it is attached, cited by Pike & Fischer in their currently revised reference work, *Administrative Law*, Vol. 2, page 136.

There was in the *St. Paul* case a dissenting opinion by Mr. Justice Stone; but a reading of it will show that the instant case is not even within the principles of the dissent (cited by Mr. Justice Bailey). Justice Stone says (282 U. S., at p. 341) :

"If appellee were unable or unwilling to comply with the order as made, equity and good conscience required, at least, either disclosure of that fact to the District Court before securing the transfer of the railroad property to it; * * * or *prompt initiation of the present proceedings to test the validity of the order* before a situation had been created prejudicial to the public interest and to the Commission's performance of its duties." (Italics ours.)

That is exactly what the plaintiff in the instant case did. As soon as plaintiff learned that a situation had been created by these defendants, whereby compliance by it with the invalid condition would have a ruinous effect upon its business, because of a non-insurance commitment previously unknown to it but known to the defendants and because the condition involved a "policy" which the defendants later

admitted they had no power to enforce, it promptly brought proceedings to have its invalidity determined. In no view of the law applicable in the instant case, therefore, can it be said that there was any failure on the part of the plaintiff to conform to "elementary standards of fairness and good conscience" (Stone, *J.*, 282 U. S., at p. 342).

The dissent also objected that the judgment "precludes any future action by the Commission in the performance of its statutory duty" (282 U. S., at p. 343). Not so in the case at bar, for the plaintiff would be subject to every law and regulation applicable to it and to all other banks and to all powers conferred upon the Board.

Closely analogous also are the numerous decisions of the Supreme Court that a foreign corporation, by seeking and receiving authority to do business in a state, is not thereby estopped from attacking provisions of the state statutes which impose conditions on the right of foreign corporations to do business and which are invalid because they are repugnant to the provisions of the Constitution of the United States.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190;

Terrall v. Burke Construction Co., 257 U. S. 529, 42 Sup. Ct. 188;

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 46 Sup. Ct. 331;

Frost Trucking Co. v. Railroad Commission, 271 U. S. 583, 46 Sup. Ct. 605;

Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 47 Sup. Ct. 179.

This principle is clearly stated in the leading case of *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423 at page 468 of 180 U. S., as follows:

"The defendant however insists that some of the provisions of the statute are in violation of the Constitution

of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' §1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repugnant to the Constitution of the United States."

These cases stand unchallenged today, except by the opinion of the learned Justice in the court below in this case. As authority for his repudiation of the Supreme Court decision in the *St. Paul* case, Mr. Justice Bailey has cited four other Supreme Court decisions: *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U. S. 125, 42 Sup. Ct. 440; *St. Louis Malleable Casting Company v. Prendergast Construction Company*, 260 U. S. 469, 43 Sup. Ct. 178; *Hurley v. Commission of Fisheries of Virginia*, 257 U. S. 223, 42 Sup. Ct. 83; *United Fuel Gas Company v. Railroad Commission of Kentucky*, 278 U. S. 300, 49 Sup. Ct. 150. Each of these cases was decided earlier than the *St. Paul* case. More important, each invoked the doctrine of estoppel against an attempt by a party to attack the *validity of a state statute* by grace of which the attacking party had accepted a privilege.

In contrast this plaintiff attacks the *illegality of the action of appointed government officials* who have imposed a condition which is contrary to the provisions of the applicable statute. The validity of the statute is not questioned in this case.

It is significant that the court below, even in writing an opinion supporting the view of the defendants, rejected,—failed even to cite—the two cases upon which defendants

primarily relied to support their estoppel argument in the court below: *American Bond & Mortgage Co. v. United States*, 52 F. 2d 318 (C. C. A. 7th, 1931); *White Star Bus Line, Inc. v. People of Puerto Rico*, 75 F. 2d 889 (C. C. A. 1st, 1935). Neither these cases nor those cited by Mr. Justice Bailey are in point here.

American Bond & Mortgage Co. v. United States, 52 F. 2d 318 (C. C. A. 7th, 1931), involved a suit by the holder of a license for the operation of a radio broadcasting station for an injunction to compel the Federal Radio Commission to grant the plaintiff's application for renewal of its license. The injunction was denied. However, the court repeatedly emphasized the fact that the revocable and limited character of the license granted was in strict conformity with the statutory provisions. At page 320 the court said:

"We are likewise satisfied that appellants are not in a position to attack *an order of the Radio Commission which was within its power to make*, without first exhausting the remedies given them by the Radio Act, * * * ." (Italics ours.)

At page 321 the court quoted with approval from *Cooley on Constitutional Limitations*, as follows:

"So a person who obtains a *license under a law*, and seeks for a time to enjoy the benefits thereof, can not afterwards, and when the license is sought to be revoked, question the constitutionality of the act.'" (Italics ours.)

Again, at page 322, the court said:

"Moreover, we would be compelled to reach the same conclusion even though appellants had not limited or narrowed their asserted rights by applying for and accepting a limited license or permit. For it has been held by the various courts, that have passed upon the question, that the regulation of broadcasting stations is within the expressly delegated power of Congress to regulate interstate commerce."

Of course, there is no such thing as a "limited" membership in the Federal Reserve System.

White Star Bus Line, Inc. v. People of Puerto Rico, 75 F. 2d 889 (C. C. A. 1st, 1935), involved a bus franchise which was held by the court to partake of the nature of a contract between the grantee and the grantor. One who has obtained advantages in this bargaining process may well be precluded from questioning the authority or power of the other contracting party respecting particular items. As is pointed out later in this brief, however, there is no statutory provision anywhere for *contracts* with respect to Federal Reserve membership. Such is contrary to the whole scheme of the Federal Reserve Act. Congress has set the pattern and declared all eligible banks to be equally entitled to membership.

POINT III.

The facts do not support estoppel.

It is undisputed *now* that these defendants have entered into an agreement with the Federal Deposit Insurance Corporation respecting the "policy" which resulted in the prescription of Condition No. 4 (Andrews aff., App. 63-67; Exhs. 14, 16 and 19, App. 69-70, 72-73, 82-85). It is equally undisputed *now* that in the process of developing this "policy" the Federal Deposit Insurance Corporation indicated to the defendants "its unwillingness under existing circumstances to insure * * * any bank in the [Transamerica] group which may withdraw from the Federal Reserve System" (Exh. 19, App. 84).

Yet it appears that *at the time when Condition No. 4 was imposed* upon the plaintiff bank the defendants did not disclose to the plaintiff and the plaintiff was not aware of this secret agreement which would have the necessary effect of depriving the plaintiff *permanently* not merely of its Federal Reserve membership but also of its federal deposit in-

surance in the event that Condition No. 4 should ever be enforced (Parker aff., App. 31-32; Exhs. 6, 7, 10 and 12, App. 49-50, 53-54, 58-61; Griffith aff., App. 61-62; Andrews aff., App. 62-68; Exh. 19, App. 82-85). It definitely appears that plaintiff was not informed of this most important incident of Condition No. 4 until March 24, 1944, nearly two years after the plaintiff's admission to membership in the Federal Reserve System and that plaintiff immediately authorized the institution of legal proceedings to determine the legal effect of the condition and has been protesting against the condition with all the vigor at its command ever since (Parker aff., App. 31-32). It is also undisputed that Transamerica Corporation protested against defendants' "policy" announcement of February 14, 1942 immediately after its receipt (Andrews aff., App. 64; Exh. 15, App. 70-72). In Mr. Andrews' letter to the Board of Governors dated March 17, 1942, he stated in part "it [Transamerica] cannot, on the basis of its present understanding of the statutes, accept such a ruling on behalf of itself or *any bank in which it owns any interest.*" (Exh. 15, App. 71, Italics ours.)

It would be stretching the doctrine of estoppel to unprecedented length to hold that *plaintiff* is legally barred from protesting against the invalidity of a condition which, without plaintiff's knowledge, was to operate as a part of an uncommunicated agreement with third parties to deprive the plaintiff of Federal Deposit Insurance,—*an agreement which remained unknown to the plaintiff for two years after plaintiff is alleged to have waived the right to object to it.*

Even in a situation where "estoppel" can be created by agreement (which we have previously shown cannot be done where the party seeking the benefit of the estoppel is a public official attempting to enforce regulations or conditions unauthorized by his statutory authority), it is established that there can be no estoppel in the absence of a meeting of the minds of the parties upon all the relevant

facts. See: *Leathem Smith-Putnam Nav. Co. v. National Union Fire Ins. Co.*, 96 F. 2d 923, 928 (C. C. A. 7th, 1938).

Equitable estoppel is at most an instrument for the avoidance of injustice. It cannot properly be invoked to perpetuate injustice.

POINT IV.

Defendants have admitted officially that they had no right to impose a restriction such as Condition No. 4.

Defendants have expressly admitted in official public documents that the Board of Governors has no power to limit the investments in bank stocks of bank holding companies such as Transamerica Corporation (App. 96-101). Three brief extracts are repeated here:

From Thirtieth Annual Report of the Board of Governors (Exh. 24, App. 96) :

“* * * the only limitation which the law imposes upon the control of subsidiary banks by bank holding companies is that the latter may not vote their stock in a controlled bank without securing a voting permit from the Board, and it is only as an incident to obtaining the voting permit that there is any regulation at all.
* * * ”

“There is now no effective control over the expansion of bank holding companies either in banking or in any other field in which they may chose to expand. * * * ”

From Eccles testimony before Committee on Banking and Currency April 5, 1943 (Exh. 25, App. 97) :

“Mr. Patman: Do not you have some power and authority to deal with that situation?

“Mr. Eccles: We do not.

“Mr. Patman: Have you ever asked for any?

“Mr. Eccles: No we have not. * * * ”

From Crowley testimony before the same Committee April 1, 1943 (Exh. 27, App. 100) :

"Mr. Crowley: Yes, we have three agencies for the control of branch banks extending to banks under their supervision. We have no control over stopping a holding company from extending their ownership of corporate banks. We have no way to do that. * * *"

"Mr. Crowley: No; I mean it [Holding Company law] did not stop the growth of any bank holding company. * * *"

In other portions of the testimony quoted in the exhibits, Mr. Eccles, Mr. Crowley, and Mr. Townsend speaking officially for the Board, advocated legislation extending the powers of the Board to enable the Board legally to prevent the growth of bank holding companies. The Congress, however, has not adopted any such legislation and it is now obvious that these defendants are trying to establish by their own acts and without legislative warrant a policy at variance with the law.

This Court may take judicial notice that on April 30, 1946, the very next day after the oral argument of these motions, a new bill was introduced (H. R. 6225), "To provide for control and regulation of bank holding companies, and for other purposes", which bill, according to the public press, was introduced at the suggestion of the defendant Eccles. It follows the general recommendations contained in the Thirtieth Annual Report of the Board of Governors to the Congress, and the 1945 hearings, other extracts from which appear in this record (Exh. 24, App. 96-97). The following two extracts from the bill indicate that the defendants are *still seeking* a declaration of policy and positive enactment by the Congress which will authorize such control of stock ownership in member banks as was attempted by Condition No. 4 in this case:

"DECLARATION OF POLICY

"SEC. 2. It is hereby declared to be the policy of Congress, in accordance with which policy all of the

provisions of this Act shall be interpreted, to control the creation and expansion of bank holding companies;
* * *.

"ACQUISITIONS OF BANK SHARES OR BANK ASSETS

"SEC. 6. (a) No plan, undertaking, or agreement by or on behalf of any company which would result in that company owning, either directly or indirectly, 10 per centum or more of the voting shares of each of two or more banks, and no plan, undertaking, or agreement by or on behalf of any bank holding company to acquire either directly or indirectly any voting shares of a bank, shall be consummated, effectuated, and completed except with the prior approval of the Board."

It is perhaps needless to add that the Congress has not yet enacted any such legislation.

The Supreme Court of the United States in a recent opinion has held that an administrative agency cannot employ administrative measures founded upon misapprehension of the legal rights of the parties in order to effect a change of policy for which legislation has been sought. *Arenas v. United States*, 322 U. S. 419, at 433-434, 64 Sup. Ct. 1090.

In view of the now admitted lack of legal authority for the promulgation of the restrictions involved in Condition No. 4, it should not be necessary to present further argument on this question. However, since the defendants have declined to cancel the condition, we feel obligated to render to the court such assistance as possible in the formulation of an appropriate declaratory judgment and it is hoped that the argument to follow will be thus helpful.

First we must point out a fundamental error, stated by way of dictum, in the opinion of Mr. Justice Bailey.

POINT V.**Unsound banking policies not involved.**

After deciding the case on the ground of estoppel, Justice Bailey adds (App. p. 117) as an apparent afterthought and without citation of authority:

“* * * indeed, it may well be that the condition imposed was within the Board’s discretion if it was of the opinion that unsound banking policies were being pursued by Transamerica and that the character of management of this plaintiff bank, if Transamerica obtained control, would be detrimental to sound banking.”

We are at a loss to understand this statement. There are no facts in the record which would warrant any such speculation—and it is even based upon a patent misconception of Condition No. 4. Much less does it point to any condition or circumstance for which the plaintiff bank is or could be responsible. There was absolutely nothing before the court to indicate that any banking policies were being pursued by Transamerica Corporation. It is not a banking corporation. It is a matter of common knowledge, however,—especially in California—that Transamerica Corporation is a bank holding company, that as such it is presently under the legal supervision of the Board of Governors of the Federal Reserve System, that its interests extend to a number of banks which are progressive and sound institutions.

If there is anything wrong with Transamerica’s so-called banking policies this plaintiff cannot understand why it (Peoples Bank of Lakewood Village), rather than Transamerica or some other bank in which such banking policies are being practiced, should be the one exposed to penalty. The plaintiff recognizes that it must maintain sound man-

agement and sound banking policies, but forfeiture of membership can only be imposed for failure to correct specific situations (See 12 U. S. C. §§77, 264(i)^{7a}). The court indicates a possibility of "discretion" if the Board was of the opinion that the character of management of the plaintiff bank "if Transamerica obtained control" would be detrimental to sound banking. There are now no *ifs* to the purported applicability of this condition under altogether different facts. The facts show that Transamerica has *not* obtained control and that the condition before the court contemplates that the plaintiff must forfeit its membership at the option of the defendants even if Transamerica or any other holding company should acquire a small minority of its stock. Control is not at all involved or necessary to invoke this forfeiture condition. Much less is management involved. Yet this "sword of Damocles" continues suspended.

The defendants have moved to dismiss, thus electing to stand on the facts alleged in the complaint. They must have known that any attempted justification of the condition would be unsuccessful not only because it rests upon no legal or statutory authority, but because of the impossibility of establishing the proposition that holding company influence is necessarily detrimental. They had indeed made an express statement to the contrary in their report to Congress (Thirtieth Annual Report, App. 96-97).

In making such election, having named both Transamerica Corporation and Bank of America in the condition, they must have had a full appreciation too, of their inability to establish that any bank of the many in which Transamerica has had an interest has been detrimentally affected by reason of that interest. This record affirmatively shows that Transamerica influence through stock ownership has contributed to the development of the leading bank in the United States

^{7a} Statutory Appendix, pp. A-23 to A-24, A-2 to A-4.

and that no bank in which it has ever had any substantial interest has failed to meet in full all of its obligations (App. 76-79; 92-95).

The record shows that one of the defendants (Eccles), in expressing to a committee of Congress his opinion that any bank holding company should not be permitted to invest in bank stocks and in stocks of other industries at the same time, commented that he would regard such a practice as unsound, but he recognized that the law permits it (App. 98-100) and we note and the record shows that thus far his personal opinion has not been expressed in any legal enactment (App. 68). There is no factual basis whatever for even a fanciful opinion that control by Transamerica, if that were involved, "would be detrimental to sound banking." Much less could such an opinion be substituted for the legal standards of membership eligibility at the mere option of administrative officers.

It is submitted that the supposititious statement of the District Court has no support whatever in the record, that it discloses a complete misconception of the very language of the condition, that it is contrary to the admitted facts, that it cannot be substituted for legal standards of membership and has no proper place in the consideration of the legal issues involved.

POINT VI.

The power of the Board to attach conditions to membership in the Reserve System is limited by statute and the Board has no discretion to exceed such limits. This conclusion is emphasized by the statutory history of the Federal Reserve Act.

The sole source of authority in the Board to impose any conditions upon the acquisition by an applicant state bank of stock in a reserve bank is found in the following excerpt from 12 U. S. C. §321⁸:

“ * * The Board of Governors of the Federal Reserve System, subject to the provisions of this title⁹ and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.”¹⁰*

The paragraph, which follows in the statute, expresses the conditions which the Board may validly prescribe “subject to the provisions of” the Federal Reserve Act and “pursuant thereto.”

The Congressional intent that the Board should not have authority to roam at large in the prescription of conditions has been made very clear. As Section 321 was worded prior to amendment in 1927, it provided in broad language as follows (40 Stat. 233):

“The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the applying bank to become a stockholder” (Public Law No. 25, 65th Congress, approved June 21, 1917).

But this broad provision was amended by Public Law No.

⁸ Statutory Appendix, pp. A-7 to A-8.

⁹ “Title” as here used means the Federal Reserve Act. See Federal Reserve Act, as amended, Section 9, par. 1.

¹⁰ All italics ours, unless otherwise stated.

639 of the 69th Congress, approved February 25, 1927, to read as it now does. In other words, Congress having once granted to the Board very broad powers to prescribe conditions, saw fit to restrict these powers by the clear language of the section as it now reads, and required the Board to find express authority in the statute itself and within the factors stated for such conditions as it might prescribe.

The phrase "subject to such conditions as it may prescribe" was changed by that amendment to read "subject to *the provisions of this Act and to* such conditions as it may prescribe *pursuant thereto*" (see Digest of Rulings of Board of Governors of the Federal Reserve System to October 1, 1937, pp. 343-344). In discussing the amendment of this section of the Act on the floor of the Senate on February 23, 1925, Senator Pepper of Pennsylvania, who favored the change, mentioned that it was one in which Senator Glass was particularly interested, and he called for

"the imposition of something like a limitation upon the present authority of the Federal Reserve Board to impose * * * any kind of conditions or restrictions which the board approves as a condition of admissibility to the system. * * *"

He also stated that:

"* * * the committee thinks that the discretion of the Federal Reserve Board in the premises should be a discretion exercised pursuant to the provisions and conditions of the act; that is, that there was no intent of Congress, when the Federal reserve act was passed, to create in the Federal Reserve Board a body to prescribe any kind of conditions it pleased as a condition precedent to admissibility to the Federal reserve system, but rather to confer upon the Federal Reserve Board authority to make regulations pursuant to the act fixing the terms upon which banks might become members

of the Federal reserve system" [66 Cong. Rec. part 5, 4412-4413].

The Federal Reserve Board itself recognized the important and clearly restrictive effect of this amendment by the following statement appearing in the Annual Report of the Federal Reserve Board to Congress for the year 1927, at page 43:

"Conditions of membership which may be imposed on State member banks.—The first paragraph of Section 9 of the Federal reserve act was amended by the McFadden Act so as to require that the conditions imposed by the Federal Reserve Board upon State banks admitted to membership in the Federal reserve system shall be pursuant to the Federal reserve act."

From the Senate Committee hearings, it appears that the amendment was occasioned by attempts of the Reserve Board, even at that early date, to prescribe conditions which in their discretion were warranted. The Board had already, as Senator Glass put it, "usurped the legislative functions of Congress."

Examination of the transcript of hearings before a subcommittee of the Senate Committee on Banking and Currency, 69th Congress, 1st Session, on S. 1782 and H. R. 2 held February 16, 17, 18 and 24, 1926 and the letter quoted at pages 38-45 from Vice-Governor Platt of the Federal Reserve Board to Chairman McFadden of the House Committee, will show the purpose of the amendment and the basis of the Federal Reserve Board's opposition to it. The Board said:

"* * * the board has no hesitancy in expressing its unqualified disapproval of this proposed amendment."¹¹

The amendment was adopted nevertheless.

In its letter of opposition, the Board had also stated that it would not "prescribe any condition of membership which

11 Statutory Appendix, p. A-33.

will * * * subject the applying bank to any greater limitations or restrictions than those under which national banks shall operate; because the Board never has and never would prescribe any such discriminatory condition of membership."¹²

The prophesy contained in Governor Platt's last quoted sentence is belied by the action of these defendants in imposing Condition No. 4 on Peoples Bank. The possibility of such action, however, apparently was foreseen by the Congress, which adopted the restricting amendment in 1927, thus rejecting the plea of the Reserve Board for broad discriminatory power to impose any condition as it might see fit. Is the Board without the orbit of legislative control?

It was even brought out in the course of the hearing that the limitation had once been in the law but had been omitted "inadvertently" later. This point was developed by Senator Glass, "the father of the Federal Reserve System", during the testimony of Dr. Henry P. Willis, a noted economist, at pages 132-135 of the printed transcript of the same hearings, as more fully appears from the testimony reproduced in the Statutory Appendix.¹³ But briefly note the following. After Dr. Willis had advocated the addition of the expression "pursuant to the provisions of this act", Senator Glass said:

"Senator Glass: It was in the original Federal reserve act and how it got out I do not understand.

"Doctor Willis: Put those words in there and it will be impossible for the Federal Reserve Board to put banks out of the system because they have branch banks."

The last quoted admonition is significant in this case in which it appears that, nineteen years later, these defendants are asking this Court to hold that plaintiff's right

¹² Statutory Appendix, p. A-36.

¹³ Statutory Appendix, pp. A-36 to A-39.

to continued membership in the Federal Reserve System has been forfeited because it now has a stockholder (Trans-america Corporation) which owns stock in other banks, including a minority interest in Bank of America, which has branch banks. They could not exclude any national bank for that reason. It is therefore fair to say that the 1927 amendment was adopted against the express desires of defendants' predecessors for the stated purpose of stopping, and in the future preventing, the imposition of just such restrictions on Federal Reserve membership as was attempted by Condition No. 4.

As further showing that Section 321 was never deemed by Congress to give the Board authority to impose Condition No. 4, it should be noted that in both the Banking Act of 1933 and the Banking Act of 1935, provision was made whereby it was compulsory for State banks to become members of the Federal Reserve System by a stated time in order to retain their status as, or to become, insured banks.¹⁴ 12 U. S. C. §264(y) (Act of August 23, 1935, c. 14, 49 Stat. 684) contained a similar provision which has since been repealed. It is obvious that when Congress required membership in the Reserve System to be obtained in order that the banks be continued as insured banks it did not authorize discrimination to be practiced against those which might have corporate shareholders. Stock in many such state banks throughout the country was held by corporations which either were or were capable of becoming holding company affiliates. Congress not only knew this as a matter of common knowledge, but it legislated on the subject elaborately in the same act that created the Federal Deposit Insurance Corporation,—the Banking Act of 1933. To have

¹⁴ The Banking Act of 1933, required all State banks to become member banks by July 1, 1936, in order to remain or become insured. Section 8, Banking Act, 1933, 12B (1)(7) (Act of June 16, 1933, c. 89, 48 Stat. 162).

excluded such banks from membership in the System and from insurance because some corporation owned a few shares of their stock was not by the remotest inference authorized and it would have been altogether unthinkable.

The powers of the Federal Reserve Board and the limitations imposed thereon by Congress may be seen in better perspective if we recall the original purpose and early history of the Federal Reserve System. The System was set up for the convenience and security of *all banks*,—not the privileged few. *All banks* were encouraged to become members. This early history and fundamental purpose are repeatedly emphasized by William P. G. Harding, a former Governor of the Federal Reserve Board, in his book entitled "The Formative Period of the Federal Reserve System during the World Crisis" (1925). At pages 83, et seq., Mr. Harding quotes from an illuminating letter written by President Wilson on October 13, 1917 urging membership in the System and pointing out the general availability of such membership. The President is quoted as saying in part:

"The Federal Reserve Act is the only constructive financial legislation which we have ever had which was broad enough to accomodate at the same time banks operating under powers granted by the general Government and banks whose charters are granted by the respective States. The unification of our banking system and the complete mobilization of reserves are among the fundamental principles of the Act."

He refers to then recent amendments which removed previous objections by state banks and says:

"As the law now stands, it leaves member State bank and trust companies practically undisturbed in the exercise of all the banking powers conferred upon them by the States. The law provides also in definite terms the conditions upon which any State bank or trust company may withdraw from the System."

He then shows that some of the largest are becoming members, points to the importance of finances resting "on the firmest possible foundation" and being "adequately and completely conserved", and asks:

"How can this necessary condition be brought about and be made permanently effective better than by the concentration of the banking strength of our country in the Federal Reserve System. * * *

"May I not, therefore, urge upon the officers and directors of all non-member State banks and trust companies, which have the required amount of capital and surplus to make them eligible for membership, to unite with the Federal Reserve System now and thereby contribute their share to the consolidated gold reserves of the country? I feel sure that as member banks they will aid to a greater degree than is possible otherwise in promoting the national welfare, and that at the same time, by securing for themselves the advantages offered by the Federal Reserve System, they will best serve their own interest and the interest of their customers."

Prior to the amendments referred to, membership was confined almost wholly to national banks and embraced considerably less than half the banking resources of the country. (Harding, "The Formative Period of the Federal Reserve System During the World Crisis" (1925), p. 70.) After the amendment and after the President's appeal, large and small state banks came in and the resources of the System were raised to about 70% of the whole. (Harding, *id.*, pp. 84-85.) Today it embraces about 86%.

Further emphasis of the Congressional intent that the Board of Governors was not to be permitted to roam at large in imposing conditions, but must look to the authority granted by the statute, is given by 12 U. S. C. §§327 and 328.¹⁵ Section 327 authorizes the Board to require a for-

¹⁵ Statutory Appendix, pp. A-11 to A-12.

feiture of membership on a showing "that a member bank has failed to comply with the provisions of §§321-338, inclusive," but significantly requires restoration of the erring bank to membership "upon due proof of compliance with the conditions *imposed by said sections.*" Section 328, by the phrase "under authority of law", again negatives the existence of any "general discretion" in the Board of Governors to deprive a member bank of its privileges.

Section 329a¹⁶ expressly gives the Board power "in its discretion", after admitting a state bank to membership with less than the ordinarily required capital, to require it to increase its capital and surplus. *Such* a condition is "subject to the provisions of the Act" and "pursuant thereto".

By Regulation H, Section 6, the Board has established three standard conditions to be attached to every permit and consequently, in fact, attached to the permit given to the plaintiff. But these standard conditions are nothing more or less than the Board's paraphrase of the requirements of the statute, and therefore place no restrictions upon the conduct of the member bank other than those that the statute itself requires.

In Regulation H, Section 6, the Board states that "*pursuant to the authority contained in the first paragraph of Section 9 of the Federal Reserve Act*" (12 U. S. C., §321) "the Board * * * will prescribe the following conditions of membership for each State Bank hereafter applying for admission to the Federal Reserve System, and, in addition, such other conditions as may be considered necessary or advisable in the particular case". It cannot be consistently argued that Condition No. 4 is one of "such other condi-

16 Statutory Appendix, pp. A-13 to A-14.

tions" which the Board believes "necessary or advisable in the particular case." The Board, in Regulation H, Section 6, quotes as the source of its authority for the regulation, the limiting language of the statute, to wit, that the conditions must be such as "it may prescribe pursuant thereto". So the Board, in adopting the regulation clearly contemplated that these "other conditions as may be necessary or advisable in the particular case", must be conditions that are authorized by statute.

By ingenious phrasing of Condition No. 4, the defendants attempted to give a sale of stock by a shareholder to Trans-america, an act over which the plaintiff bank has no control, the superficial aspect of a violation of Regulation H, §7(c), which requires state member banks to "comply at all times with any and all conditions of membership prescribed by the Board in connection with the admission of such bank to membership". But the requirement that a Bank shall "comply" cannot fairly be construed as contemplating conditions with which it is beyond the power of the bank to comply.

POINT VII.

Any condition or regulation imposed in excess of statutory power is void. The statute does not authorize the Board of Governors to make "contracts" with applicants for admission as to the circumstances in which they will withdraw.

There is nothing unusual, as the defendants would have the court believe, about a regulatory agency being *restricted* in the exercise of its discretion to the imposition of regulations in harmony with the statute creating the agency. As

the Court said in *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129, 56 Sup. Ct. 397 (297 U. S. at p. 134) :

“The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Produce Co.*, 265 U. S. 315, 320-322; *Miller v. United States*, 294 U. S. 435, 439-440, and cases cited.”

The Court decided in the *Manhattan* case that the regulation in question was invalid because both inconsistent with the statute and unreasonable.

In *Waite v. Macy*, 246 U. S. 606, 38 Sup. Ct. 395, the plaintiff sought an injunction to prevent the appellants, as constituting the board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiff tests which it was alleged were illegal and which, if applied, would lead to the exclusion of the tea. The Court found that the regulation established a ground for exclusion of the tea not recognized by the statute and therefore sustained the injunction, saying, at page 610:

“The Secretary and the board must keep within the statute, *Merrit v. Welsh*, 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544 * * *

In *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, Jones sued Morrill, a collector of customs, to recover duties paid

under protest. The statute provided that animals imported for breeding purposes should be admitted free, under such regulations as the Secretary of the Treasury might prescribe. The Secretary had adopted a regulation providing that the collector should "be satisfied that the animals are of superior stock". The court held that the regulation was in excess of the power of the Secretary and invalid.

The most recent reiteration by the Supreme Court of the requirement that authority for the exercise of administrative discretion be found in the governing statutes appears in *Hannegan v. Esquire, Inc.*, 90 L. Ed. 429 (decided February 4, 1946, and not yet officially reported). In that case the court held unauthorized an attempt by the Postmaster General to restrict the statutory classification of publications entitled to second class mailing privileges. The court did not question the good faith of the Postmaster General in establishing a "policy" which he deemed in the public interest, but it pointed out that *he* had not been given the statutory right to apply any such "policy".

Vom Baur in Vol. 1, Federal Administrative Law, §25 (1942), states:

"If the statute sets up standards governing the exercise of the authority conferred, the delegate cannot act validly except within those standards; and findings by the delegate as to the existence of the required basis for its action are necessary to sustain that action. Otherwise the case would still be one of an unfettered discretion, as the qualification of authority would be ineffectual."

In *International Railway Co. v. Davidson*, 257 U. S. 506, 42 Sup. Ct. 179, Mr. Justice Brandeis, writing for an unanimous court, upheld the sufficiency of a bill for an injunction, re-

straining the imposition by the Collector of Customs of regulations going beyond the scope of the statute, in the following language (at p. 514) :

“Section 161 does not confer upon the Secretary any legislative power. *Morrill v. Jones*, 106 U. S. 466; *United States v. George*, 228 U. S. 14. A regulation to be valid must be reasonable and must be consistent with law.”

The restrictions upon the exercise of administrative discretion granted by statute were well stated in the Final Report of the Attorney General's Committee on Administrative Procedure, published in 1941. That committee included twelve distinguished lawyers and public officials, including Chief Justice Groner of this Court. At page 2 of their report they stated :

“It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which *it* [i.e. the Congress] has embodied in law, whether it be a unified transportation or communications system, or old-age security, or the prevention of unfair practices in competition or in labor relations. But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others. Procedures must be judged by their contribution to the achievement of these ends.”

Accord:

Campbell v. Galeno Chemical Co., 281 U. S. 599, at 610, 50 Sup. Ct. 412; .

The State of Colorado v. Toll, 268 U. S. 228, 45 Sup. Ct. 505;

Miller v. U. S., 294 U. S. 435, 55 Sup. Ct. 440;

Vom Baur, *Federal Administrative Law* (1942 Ed.), Vol 1, Section 499;

Lynch v. Tilden Produce Co., 265 U. S. 315, 44 Sup. Ct. 488.

Koshland v. Helvering, 298 U. S. 441, 56 Sup. Ct. 767;

The theory of Condition No. 4 is quite peculiar. If a condition were one which the Board is authorized to attach to a permit, then upon the failure of such member bank to comply with the terms of the condition, the Board has authority to *compel* such member bank to retire from the system through the surrender of its stock, by proceeding under 12 U. S. C. §327.¹⁷

The very fact that the plaintiff bank was required to accept the condition and to agree to comply therewith is cogent evidence that the Board did not believe that it could impose the condition, relying solely on its own power, and make it effective. It is no part of the scheme of the statute or of the regulations that the applying member bank should be required in express terms to accept valid conditions and to agree to comply therewith. *Valid conditions are completely efficacious by virtue of their own strength, unsupplemented by any agreement. The statute will be searched in vain for any provision making membership in the Reserve System a subject of contract.* There are very sound reasons why this

¹⁷ Statutory Appendix, p. A-11.

is so. Any such provision would introduce inextricable confusion and be utterly inconsistent with the equal enjoyment by all qualified banks of the advantages of membership.

Further, Condition No. 4, instead of being worded as a type of condition which could be compulsorily enforced under Sec. 327, is worded in terms of obtaining an undertaking on the part of the plaintiff bank that it would "withdraw". Now, the only provision for withdrawal by a member bank is contained in 12 U. S. C. §328¹⁸, entitled "Withdrawals from membership". This is a section having to do with *voluntary* withdrawals only.

It thus appears that at the very outset the Board was clear in its own mind that it had no power to impose the terms of Condition No. 4 as a *condition*, and consequently it was seeking to accomplish its unauthorized purpose by exacting from the plaintiff a promise to exercise a privilege that would belong to plaintiff—something that the Board clearly had no right to do; also something that the board of directors of the plaintiff bank could not properly agree to in view of their constant and continuing obligations to the depositors and stockholders as well as their legal inability to bind their successors. *The statute vests the option of withdrawal in the member bank and in no one else.*

POINT VIII.

The statute prescribes with considerable particularity the factors to be considered by the Board in passing upon an application under Sec. 321. The Board, in passing upon a state bank's application, has no authority to "consider" whether its stock is then or may thereafter be held by a holding company.

The statute (§322)¹⁹ expressly provides for the matters which the Board must take into consideration in passing upon the application of a state bank. It is therein provided:

¹⁸ Statutory Appendix, pp. A-11 to A-12.

"In acting upon such application the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this chapter".

Upon becoming a member bank, the applying state bank, *ipso facto*, becomes an insured bank under that part of the Federal Reserve Act which creates the Federal Deposit Insurance Corporation (12 U. S. C. §264(e)(2))²⁰. That statute requires the Board of Governors of the Federal Reserve System to certify to the Federal Deposit Insurance Corporation that consideration has been given to the factors enumerated in subsection (g).²¹

Subsection (g) states that the factors to be enumerated in the certificate shall be: "The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section."

By the application of the doctrine *expressio unius exclusio alterius*, it would thus appear that the only factors to be taken into account by the Board in passing upon the application of a state bank for permission to become a stockholder, are the factors expressed in Section 322 and Section 264 (g). "The conditions pursuant thereto" which the Board of Governors may prescribe in permitting an applying bank to become a stockholder must, in the absence of other prescribed conditions of the statute (and there are none), have to do with the matters which the Board is required by other sections to "consider" in passing upon the application of the

19 Statutory Appendix. p. A-8.

20 Statutory Appendix, p. A-1.

21 Statutory Appendix, p. A-2.

applying bank. Consequently, since these matters to be considered have no connection, even remote, with stock ownership in the future it can be stated with conviction that the Board had no authority to consider and then impose conditions affecting possible stock ownership at some future time in the applying state bank by a holding company.

POINT IX.

Not only is there no authority in the statute for Condition No. 4, but it is in direct conflict with several provisions of the statute.

(a) Condition No. 4 is directly contrary to the stated purpose of 12 U. S. C. §264(y) (Federal Deposit Insurance provisions of the Federal Reserve Act).²² That section states that the purpose of the Federal Deposit Insurance provisions is "to provide *all* banks with the same opportunity to obtain and enjoy the benefits" of Federal Deposit Insurance.

Thus, if plaintiff had chosen to become merely a non-member insured bank, no conditions of any kind could have been lawfully imposed upon it by the Federal Deposit Insurance Corporation. Yet defendants now claim (App. 5-6, 7-8) that, having become a member bank under the terms of Condition No. 4, it can and automatically will be deprived of its status as an insured bank by being deprived of its status as a member bank, thereby depriving it of the "same opportunity to obtain and enjoy the benefits" of Federal Deposit Insurance "along with all banks". Indeed, it appears that, without advance notice to either the plaintiff or Transamerica Corporation, the defendants have entered into an agreement with the Federal Deposit Insurance Corporation that plaintiff will be denied Federal Deposit Insurance upon withdrawal from the Federal Reserve System (Eccles letter November 13, 1942, App. 83-84).

²² Statutory Appendix, pp. A-5 to A-6.

This is in direct conflict with §264(y)²³ which says that such discrimination shall not take place "in any manner".

(b) Condition No. 4 runs counter to a number of provisions expressly contemplating that the stock of a state member bank may be held by a holding company. There are so many provisions of the statute expressly contemplating that stock of a state member bank may be owned by a holding company that argument would seem unnecessary to demonstrate the propriety of such ownership. We confine ourselves, therefore, to a listing of a few of the sections of U. S. C., Title 12, containing such provisions, with references to the statutory appendix:

§304²⁴—Only one bank so affiliated may vote for Federal Reserve Bank directors.

§334²⁵—Reports from a state member bank shall set forth information as to relations between such bank and its holding company affiliate.

§486²⁶—Waives requirement of reports respecting holding company affiliates in certain instances.

§337²⁷—State member bank must obtain agreement from its holding company affiliate that latter will be subject to same conditions as holding company affiliates of national banks and if voting permit of affiliate is revoked all affiliated member banks of such affiliate may be required to forfeit their Federal Reserve memberships.

§61²⁸—Holding company affiliate required to enter into certain agreements in applying for a voting permit—but not an agreement to limit future stock acquisitions.

23 Statutory Appendix, p. A-5.

24 Statutory Appendix, p. A-6.

25 Statutory Appendix, pp. A-15 to A-17.

26 Statutory Appendix, p. A-21.

27 Statutory Appendix, pp. A-18 to A-19.

28 Statutory Appendix, pp. A-24 to A-29.

§338²⁹—Holding company affiliates of state member banks are subject to examination by examiners selected by Board of Governors.

§371(c)³⁰—Provides limitations upon member banks making loans to affiliates or purchasing their securities or accepting such securities as collateral.

§337³¹—Prohibits affiliation with corporation engaged principally in issue or flotation of securities. Under the doctrine of *expressio unius exclusio alterius*, this would permit affiliation with other types of corporations.

From these statutes at least four conclusions are apparent:—

1. That a bank holding company is recognized by law as a legitimate organization which operates under the supervision of the Board of Governors of the Federal Reserve System.

2. That no power exists in the Board of Governors to place any restriction whatsoever on the acquisition by a holding company of any amount of stock in either a state member bank or a national bank.

3. That a state bank is entitled to membership in the Federal Reserve System on the *same terms and conditions* as a national bank.

4. That any so-called "condition" of membership which would operate to remove a member bank from the Reserve System on account of a lawful acquisition of stock by any association or holding company would impose a penalty where no offense has been committed,—a penalty which is inconsistent with the rights of both the company and the bank as clearly recognized in the statutes.

29 Statutory Appendix, pp. A-19 to A-20.

30 Statutory Appendix, pp. A-20 to A-21.

31 Statutory Appendix, pp. A-18 to A-19.

In the face of all these provisions, it is clear that as one of the "conditions * * * *pursuant thereto*" which the Board of Governors may prescribe in connection with its permit to an applying state bank to become a stockholder, it cannot prescribe that the state bank shall not have a holding company affiliate. Congress has clearly recognized that this is beyond the control of the Board and of the Reserve Bank. Obviously, the greater includes the lesser, and therefore it is clear that the Board may not prescribe that if any of the stock (no matter how little) of the applying state bank shall be acquired subsequently by a holding company, the bank forfeits its rights as a member bank.

(c) The imposition of Condition No. 4 runs squarely counter to the provision of 12 U. S. C. §330³² which guarantees to state member banks the retention of their "full charter and statutory rights."

One of the "charter and statutory rights" which plaintiff has as a state bank is that its stock may be held or sold by its various owners. The laws of California impose no restrictions whatsoever upon the ownership of stock of the Peoples Bank by Transamerica, or any other company. In this connection, see the illuminating interpretation of Acting Attorney General John W. Davis in 31 Opinions of the Attorneys General, 153, September 10, 1917, holding that Clayton Act restrictions upon interlocking directorates do not apply to state banks joining the Federal Reserve System. We quote two brief, but very material excerpts:

"Unlike national banks, State banks are not compelled, but in effect are invited, to join the Federal Reserve System. In section 9 as originally enacted *Congress specified the provisions of law to which State banks must conform as conditions of membership, in-*

³² Statutory Appendix, pp. A-14 to A-15.

cluding in the specification certain provisions of preexisting law. The conditions of membership for State banks having thus been specified it could be argued not without reason that if Congress had intended by section 8 of the Clayton Act to prescribe further conditions of membership it would have affirmatively expressed that intention, which it has not done. * * *

"The intention of Congress, however, is not left to appear by implication alone. Section 9 as amended goes further, and by positive provision declares that State member banks shall retain their 'full charter and statutory rights' as State banks, 'subject to the provisions of this act and to the regulations of the board made pursuant thereto.' Since the rights existing under State laws as to selection of directors seem clearly among the 'charter and statutory rights' thus retained in *full* by State member banks, they must be held free in that regard from the restrictions imposed by section 8 of the Clayton Act" (pp. 156-157).

Further, it is a "privilege", certainly, of national member banks, to have the stock thereof owned in part or in whole by a holding company. That being a privilege of a national member bank, it is, by virtue of Section 330, also a privilege of a state member bank.

(d) Condition No. 4 also runs counter to the provision of 12 U. S. C. §328³³ which authorizes state member banks "desiring" to withdraw from the system to do so. Condition No. 4 is a requirement that the plaintiff bank, to quote the condition, "shall withdraw from membership", not when it so desires, not when its then board of directors finds it in its interest to do so, but, due to a condition imposed on it in May, 1942, when through some circumstances over which it has no control, to wit, the acquisition by Transamerica of

33 Statutory Appendix, pp. A-11 to A-12.

some stock therein, the Board of Governors request it to withdraw. That which is *voluntary* under the statute is sought to be made *compulsory* by the condition. "The membership of a state bank in the Federal Reserve System is * * * purely voluntary both in its inception and duration" (*Fidelity-Philadelphia Trust Co. v. Hines*, 337 Pa. 48, 10 A. 2d 553 (Sup. Ct. Pa., 1940)).

Upon examination, it will be seen that this compulsory withdrawal provided for by Condition No. 4 is not in conformity with Section 328 in a number of other respects.

(e) Still another provision of the statute to which Condition No. 4 runs counter is the requirement of 12 U. S. C. §301³⁴ that the affairs of every Federal Reserve Bank shall be administered "without discrimination." All the benefits of membership are derived through the Reserve Bank and the duty to avoid discrimination, thus imposed by the statute, is an impossible duty if Condition No. 4 is enforceable. Condition No. 4 has not been and could not be imposed upon national banks which are members of the System. Yet it would require the Federal Reserve Bank to deprive the plaintiff of the advantages of its Federal Reserve Bank investment, of its privilege of rediscount, etc., as a member bank.

(f) Condition No. 4 attempts to establish a method of control of the policies of the plaintiff bank inconsistent with the methods provided by 12 U. S. C. §77³⁵ and by 12 U. S. C. §264(i)³⁶. Section 77 provides a *statutory* method for protecting a member bank against "unsafe or unsound practices" on the part of its management, viz., *removal of the offending director or officer*, and a criminal penalty *upon such director or officer* if he thereafter participates in the management. There is no attempt to control the discretion of

34 Statutory Appendix, pp. A-30 to A-31.

35 Statutory Appendix, pp. A-23 to A-24.

36 Statutory Appendix, pp. A-2 to A-4.

the stockholders in the original selection of their officers and directors. There is no provision that the identity of the stockholders themselves should be subject to the approval of the Board of Governors.

Section 264(i) provides a further statutory remedy "whenever the board of directors [of the Federal Deposit Insurance Corporation] shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices * * * ." This remedy affords the bank an opportunity to correct the unsafe or unsound practices and, failing to do so, it may then have its insurance terminated, and if the bank be a member bank it will be compelled to terminate its membership in the Reserve System. There is, of course, no contention in this case, in spite of the vague references by the defendants and by the opinion of the court below to "unsound policies", that any occasion has arisen for the application of this statutory remedy. To utilize Condition No. 4 in such a manner as to impose these penalties upon the plaintiff bank would amount to an evasion of the specific provisions applicable.

We respectfully submit that the protection provided by Congress is better calculated to accomplish the purpose of the law. In any case, it is the only method provided by law and the defendants' method is entirely inconsistent with it.

POINT X.

Not only is the condition invalid for complete lack of authority to impose any condition of that character and for that purpose, but it is also invalid because arbitrary, unreasonable and unjust, and because it is discriminatory.

The defendants cited several cases in the Court below to support the proposition that the courts are without authority

to substitute their judgment for that of administrative agencies or officers of the Government in matters properly within the discretionary powers of such agencies. With this general proposition we have no dispute. The proposition, however, is only a general one and is subject to well-recognized exceptions. In the case of *Ickes v. Underwood*, 78 App. D. C. 396, 141 F. 2d 546 cited by the defendants, the rule and its exceptions were well stated at pages 547 and 548 of the opinion in 141 F. 2d as follows:

"The general rule is that the judicial power will not be interposed to limit or direct the exercise of discretion by public executive officers with respect to pending matters within their jurisdiction and control, *except in clear cases of illegality of action*. * * * As to what constitutes a clear case of illegality of action this court has said: [quoting from *Proctor & Gamble Co. v. Coe*, 96 F. 2d 518, 521, 522] *The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws*: (1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government * * *; (2) where an officer attempts to enlarge his power, or to usurp power * * *; or (3) where his act is based upon a clear mistake of law * * *; (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute * * *; (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner * * *; (6) where the act of the officer, "under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority [and] he has no power at all to do the act complained of * * *." " "

As we have previously pointed out, the imposition of Condition No. 4 by the Board brings this case within practically all of the exceptions to the rule.

The case of *Apfel v. Mellon*, 59 App. D. C. 94, 33 F. 2d 805, heavily relied upon by defendants, involved an application for a writ of mandamus to compel the Federal Reserve Board to issue a permit for a corporation to engage in foreign banking. The banking statutes required the approval of the Federal Reserve Board, without setting up specific factors to be considered. The court held that the statute conferred upon the Board a discretion to grant or withhold such approval and that such discretion could not be controlled by mandamus. But, in contrast to the provisions for Federal Reserve membership and Federal Deposit Insurance, which were expressly intended to make such privileges available to all banks in the United States, the statute involved in the *Apfel* case was clearly intended to provide "a means for conferring special and important privileges" (33 F. 2d at p. 807).

Gray v. Powell, 314 U. S. 402, 62 Sup. Ct. 326, held that whether or not a railroad was both a producer and consumer of coal so as to be exempt from certain provisions of the Bituminous Coal Act was a question of fact entrusted by the Act to the Director of the Bituminous Coal Commission and that where there was evidence to support the Commission's findings the court would not substitute its judgment for that of the Commission.

The other authorities relied upon by defendants in support of this proposition are of the same general character. All involved situations in which the matter in dispute was admittedly committed by law to the administrative discretion of the public official whose determination was attacked.

Adams v. Nagle, 303 U. S. 532, 58 Sup. Ct. 687;
U. S. v. Louisville & Nashville R. R. Co., 235 U. S.
 314, 35 Sup. Ct. 113;
Swayne & Hoyt, Ltd. v. U. S., 300 U. S. 297, 57
 Sup. Ct. 478;
New Orleans v. Paine, 147 U. S. 261, 13 Sup. Ct.
 303;
Tidal Osage Oil Co. v. West, 58 App. D. C. 327, 30
 F. 2d 737;
Obrien v. Lane, 40 App. D. C. 493;
Perry v. Work, 56 App. D. C. 92, 10 F. 2d 887.

The circumstance that the Board of Governors had some discretion as to the conditions they would impose, *within the range of their authority* with respect to the imposition of conditions, has no bearing on the question before the Court. Condition No. 4 is obviously outside of the realm of that authority and consequently outside the realm of any discretion. It was purely arbitrary and capricious, and we have shown, page 55 *et seq.*, *supra*, even ran counter to several express statutory provisions.

Absolutely no discretion existed in the Board either to impose or not to impose a condition such as Condition No. 4.

However, assuming, for the moment, the condition to be a valid condition, and assuming that it can be compulsorily enforced in some manner, the consequence of Condition No. 4 is that, the plaintiff bank, as a bank, will lose the privileges of being a member bank, and, *ipso facto*, will also lose its status as an insured bank. Both of these results are extremely detrimental to the interests of all the stockholders. The innocent stockholders who were stockholders in a bank enjoying all the valuable privileges of reserve membership and the advantageous standing of an insured bank, without any fault of their own, and not because of anything having to do with the condition of

the bank, find themselves stockholders in what is a second rate and practically a black-listed bank. The market value of their stock in the plaintiff bank is obviously depressed by the possibility of a notice to withdraw given by the Board of Governors under Condition No. 4, for, among other things, the California statute (1 Deering's California General Laws (1944 ed.) Act 652a, §1) [Stats. 1931, p. 338; Amended by Stats. 1937, p. 627.] provides for double liability of shareholders of a state bank except with respect to shares in a bank whose deposits are insured by the Federal Deposit Insurance Corporation pursuant to the Federal Reserve Act as amended. Obviously also the plaintiff bank itself would suffer in this connection, for any unissued stock of the bank which it might desire to sell for the purpose of raising capital would have a diminished market value. Indeed, it appears from the affidavits of two directors of the plaintiff bank, one of whom is its president, that constructive plans of the bank to obtain additional capital funds cannot be pursued at all until Condition No. 4 is judicially determined to be void and of no effect (Brewer, App. 108; Luddy, App. 109-110).

These consequences are also extremely detrimental to the interests of the depositors in the bank. The depositors find themselves in a condition where they have established a banking relation with a bank whose deposits at the time are insured and required to be so advertised (12 U. S. C. §264(v) (2),) but after the enforcement of Condition No. 4 of which they had no knowledge, they are depositors, if they desire to continue their established friendly relations, in a bank whose subsequent deposits are not insured and whose insured deposits will soon be exhausted. And all these consequences have nothing to do with the soundness of the bank nor with the prudent and safe manner in which its banking operations are being conducted. The bank may

be the very soundest and best managed bank in the United States, and nevertheless, because of the seeming hostility of the present defendants to Transamerica and to the Bank of America, these innocent stockholders and these depositors who have no interest in that situation are to be penalized. Condition No. 4 is increasingly embarrassing to the plaintiff bank because of the necessity in the normal course of its development for the making of commitments for longer periods of time in the future affecting such matters as lines of credit, investments, personnel, banking premises, facilities, and the like (Brewer, App. 108).

It might well be in the particular case that Transamerica's interest in the bank greatly strengthens it and adds to its stability and capacity to do business. The Board in its 1943 Report, which we have quoted above, stated that "bank holding companies have served a useful purpose in some areas of the country and have contributed banking services which might not otherwise have been available or might not now be available, * * *" (App. 97). We have no doubt that that is the fact in the instant case. The Peoples Bank having the benefit of the experienced advice of the Transamerica organization, and having the benefit of the financial support and aid of Transamerica, is a much stronger bank than it could possibly be with its purely local ownership.

Any condition which the statute authorizes the Board of Governors to impose pursuant to the statute, must be a condition which the bank has the power to perform. It must be a condition with respect to the performance or non-performance of which the bank has control. In fact, all the statutory provisions governing membership refer to the applying *bank* and to things which it must do, and not to its stockholders. To subject the bank to a condition which might deprive it of its membership in the system and of its status as an insured bank for an innocent and lawful act of

a stockholder over which it has no control whatsoever, could never have been contemplated by Congress. We repeat, that the condition is arbitrary, unreasonable, unjust, and, we say, vicious.

Further, every valid condition must be based upon the application of uniform standards to all applying institutions. It *must not be discriminatory*. The Board clearly has no right to prescribe that the Peoples Bank shall be required to surrender its stock and cease to be a member in the event that a particular holding company, or any holding company, should acquire an interest therein. It does not even have power to make the same prescription with respect to *every* existing state member bank or applying state bank and as affecting *every* possible holding company that might acquire a stock interest in a member bank through loans or otherwise. The right to discriminate in this situation would be an intolerable tyranny.

Transamerica owns sufficient stock in several member banks, both state and national, to make it a holding company affiliate of such banks and it has minority interests in other member banks, including Bank of America. None of them has been inflicted with a Condition No. 4 (Andrews, App. 65). Another bank holding company, by way of example, owns the controlling stock of 80 or more banks and trust companies. Of the state banks owned by that corporation, several are members of the Federal Reserve System, and we make bold to assert that no such condition as Condition No. 4, in any manner, shape or form, was attached to the admission of these state banks into the Federal Reserve System (See Ponsford, App. 104-105). As further proof of the arbitrary and discriminatory character of this condition, we have shown that four other California state banks have been admitted to membership subsequent to the imposition of Condition No. 4 on the plaintiff bank,—all of them pre-

sumably without any such condition. The absence of such condition is quite clear in the case of the Napa Bank of Commerce, the first bank in California admitted after the admission of Peoples Bank, as it is public knowledge that such bank has recently been absorbed by the American Trust Company of San Francisco, a state member bank, and that said Trust Company has been authorized by the Board of Governors of the Federal Reserve System to operate a branch at the location of said bank (Ponsford, App. 105-106). Thus we have the positive blessing of the defendants bestowed upon a competitor of the plaintiff and a competitor of Bank of America, while the latter are subjected to defendants' threats and condemnation.

This point is well sustained in *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129, 56 Sup. Ct. 397, *supra*, p. 48. The Court said, at page 134:

"And not only must a regulation, in order to be valid, be consistent with the statute, *but it must be reasonable. International Railway Company v. Davidson*, 257 U. S. 506, 514." (Italics ours.)

Accord

International Ry. Co. v. Davidson, 257 U. S. 506, 42 Sup. Ct. 179;

Nolan v. Morgan, 69 F. (2d) 471 (C. C. A. 7th, 1934).

See also

Vom Baur, Federal Administrative Law, (1942), Vol. 1, Section 500.

Nor can a regulation be discriminatory.

Bailey v. Holland, 126 F. (2d) 317, 322 (C. C. A. 4th, 1942).

POINT XI.

If the statute be construed as authorizing the Board to prescribe Condition No. 4, the statute would be unconstitutional as involving a delegation of the legislative power vested in Congress alone under Section 1 of Article I of the Constitution, also in contravention of the delegation of legislative power to Congress in specific instances enumerated in Section 8 of Article I. Such exercise of power by the defendants is likewise unconstitutional as being in violation of the Fifth Amendment to the Constitution.

We do not elaborate our constitutional argument, inasmuch as the defendants have repeatedly admitted in their annual report (App. 96) and in their testimony before Congressional Committees (App. 97-100, 101-103) that they do not have any power, under their own interpretation of the statute, to impose any such restriction upon bank holding companies as was attempted by the prescription of Condition No. 4.

It is an elementary principle of statutory construction that a statute should be construed, if possible, in such a manner as to avoid any conflict with the constitution. See

Panama R. Co. v. Johnson, 264 U. S. 375, 44 Sup. Ct. 391;

Lewellyn v. Frick, 268 U. S. 238, 45 Sup. Ct. 487;

Hassett v. Welch, 303 U. S. 303, 58 Sup. Ct. 559.

We submit that it is too clear for argument that Congress itself has no power to establish Condition No. 4 by direct legislation. It can, of course, say that no bank shall be a member of the Federal Reserve System whose stock is held by a holding company, but it cannot pick out one bank and say to that bank alone that it shall not be admitted nor retained as a member if any of its stock is held by a holding

company, while all other similarly situated banks may be admitted or retained. Nor can Congress by legislation expressly discriminate against any particular holding company as a holder of stock in a member bank or against a particular bank like the Bank of America, acquiring an interest through commercial loans or otherwise in a member bank, for Congress itself would have to make its legislation applicable to all institutions that were in the same situation.

A fortiori, if Congress itself could not legislate the condition, it could not delegate to an administrative board like the Board of Governors any express authority or any discretionary authority enabling it to impose such discriminatory condition. The plaintiff invokes the protection of the constitutional provisions referred to herein and specified in its complaint.

Schechter v. United States, 295 U. S. 495, 55 Sup. Ct. 837;

Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241.

POINT XII.

The defendant McKee's motion to dismiss as to him should have been denied.

Without advance notice counsel for the defendants, at the opening of the argument before Justice Bailey, orally moved to dismiss as to the defendant McKee on the ground that he had been succeeded as a member of the Board of Governors of the Federal Reserve System by Commodore Vardaman on April 5, 1946. Inquiry was made by plaintiff's counsel as to whether defendants' motion was to be construed as a motion to substitute Governor Vardaman as a defendant in place of Governor McKee. Defendants' counsel expressly declined to permit his motion to be so

construed. Plaintiff's counsel then opposed the dismissal as to the defendant McKee.

It is apparent from the complaint that this suit is not brought against government officials in their official capacity. It is brought against six individuals who are charged with using official power in excess of official right.

It is apparent from the complaint that every single act complained of occurred during the term of office of the defendant McKee and that he was an active participant throughout the course of such allegedly illegal conduct. Indeed, it had already been determined by the District Court that a justiciable controversy exists between the plaintiff and all of the defendants, including the defendant McKee, on the facts so alleged in the complaint (App. 11-23).

In such circumstances it cannot be doubted that McKee is a proper party under Rule 20 of the Federal Rules of Civil Procedure.³⁷

The plaintiff does not presently anticipate that any of the defendants would be so lacking in respect for this Court as to continue an illegal course of action after its illegality has been judicially determined by the declaratory judgment sought in the complaint. It therefore will probably not be necessary, in the first instance at least, to have any incidental injunctive relief. Certainly it is appropriate to have a declaration as to the illegality of the conduct of the defendant McKee just as it is appropriate to have such a declaration with respect to the other defendants. It is to be hoped that respect for this Court's declaration in that regard will render it unnecessary to pursue the matter further because of any conduct of the new member of the Board, Mr. Vardaman, or any future successors of any of the other defendants.

Bank of America N. T. & S. A. v. Douglas, 76 App. D. C. 373, 132 F. 2d 9 (1942), referred to in the lower court's

³⁷ Statutory Appendix, pp. A-32 to A-33.

opinion as authority for dismissal as to McKee, involved an entirely different situation. There the plaintiff had filed a supplemental complaint involving new allegations against successor members of the SEC. A period of more than two and one-half years had elapsed between the judicial determination upon the original complaint in that case and the initiation of the supplemental proceeding.

CONCLUSION

The order appealed from should be reversed; plaintiff's motion for summary judgment for the declaratory relief sought in the complaint should be granted against each and all of the defendants; and the defendants' motion for judgment on the pleadings and the motion of defendant McKee to dismiss as to him should be in all respects denied, because:

(1) The court below erred in holding the doctrine of equitable estoppel applicable to this case, there being no claim of misrepresentation by the plaintiff or of detriment to the defendants, and the effect of the alleged estoppel being to promote rather than to prevent injustice.

(2) The existence of a justiciable controversy has been properly determined by the District Court.

(3) Condition No. 4, imposed by these defendants upon plaintiff's membership in the Federal Reserve System, was illegal and invalid on its face. Its imposition was beyond the legal authority of the defendants or the Board of Governors, which is carefully limited and defined by the Federal Reserve Act.

(4) Condition No. 4 admittedly discriminated against the plaintiff and in favor of competing state member and national banks.

(5) "Unsound banking policies" are not involved; and, if they were, the defendants would have ample powers to deal with them in the manner prescribed by the Federal Reserve Act.

(6) This court should not sanction either an attempted evasion of the declared Congressional intent, such as is involved in Condition No. 4, or a practice on the part of responsible government officials such as was involved in the defendants' non-disclosure to the plaintiff of their agreement with the Federal Deposit Insurance Corporation as to the effect of Condition No. 4 upon plaintiff's independent right to the continued benefits of Federal Deposit Insurance.

(7) The conduct of the defendants in prescribing Condition No. 4 infringed the plaintiff's Constitutional rights, and its enforcement involves a further infringement.

Dated: September 16, 1946

Respectfully submitted,

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STATUTORY APPENDIX

**Excerpts from Federal Deposit Insurance Provisions
of Federal Reserve Act.**

(As set forth in United States Code, Title 12.)

**12 U.S.C. §264. Federal Deposit Insurance Corpora-
tion—Creation; duties**

* * * * *

**Insured banks; certificate of Comptroller of Cur-
rency authorizing transaction of banking business**

“(e) (2) After August 23, 1935, every national member bank which is authorized to commence or resume the business of banking, and *every State bank* which is converted into a national member bank or *which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System.* The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided, That in the case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Reserve System in the case of a State member bank, and that consideration has been given to the factors enumerated in subsection (g) of this section*” (Italics ours).

* * * * *

"Factors considered in issuing certificate to do business

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section."

* * * * *

"Termination of status as insured bank; termination of membership of state bank in Federal Reserve System on losing insured status; receivership for national bank on losing insured status

(i) (1) Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days' written notice to the Corporation, and to the Reconstruction Finance Corporation if it owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give to the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System

in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof. Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall

continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

(2) Whenever the insured status of a State member bank shall be terminated by action of the board of directors, the Board of Governors of the Federal Reserve System shall terminate its membership in the Federal Reserve System in accordance with the provisions of sections 331-338 of this title and whenever the insured status of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation whenever the bank shall be unable to meet the demands of its depositors. Whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured bank shall, without notice or other action by the board of directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System, with like effect as if its insured status had been terminated on said date by the board of directors after proceedings under paragraph (1) of this subsection.

* * * * *

Use of words "Federal Deposit Insurance Corporation" forbidden; signs; payment of dividends by defaulting bank; mergers with noninsured bank; branch banks; indemnity insurance; publication of reports; interest of deposits

"(v) (2) Every insured bank shall display at each place of business maintained by it a sign or signs, and shall include in advertisements relating to deposits a statement to the effect that its deposits are insured by the Corporation. The board of directors shall prescribe by regulation the forms of such signs and the manner of display and the substance of such statements and the manner of use. For each day an insured bank continues to violate any provision of this paragraph or any lawful provision of said regulations, it shall be subject to a penalty of not more than \$100, recoverable by the Corporation for its use."

* * * * *

"(5) No State nonmember insured bank (except a District bank) shall establish and operate any new branch after thirty days after August 23, 1935 unless it shall have the prior written consent of the Corporation, and no branch of any State nonmember insured bank shall be moved from one location to another after thirty days after August 23, 1935 without such consent. The factors to be considered in granting or withholding the consent of the Corporation under this paragraph shall be those enumerated in subsection (g) of this section."

* * * * *

Discrimination against nonmember banks

"(y) It is not the purpose of this section to discriminate, in any manner, against State nonmember, and in favor of, national or member banks; but the purpose is to provide all

banks with the same opportunity to obtain and enjoy the benefits of this section. No bank shall be discriminated against because its capital stock is less than the amount required for eligibility for admission into the Federal Reserve System" (Italics ours).

* * * * *

"Dec. 23, 1913, c. 6, §12B, as added June 16, 1933, c. 89, §8, 48 Stat. 168, and amended June 16, 1934, c. 546, §1 (1)-(10), 48 Stat. 969, 970; June 28, 1935, c. 335, 49 Stat. 435; Aug. 23, 1935, c. 614, §101, 49 Stat. 684; Apr. 21, 1936, c. 244, 49 Stat. 1237; May 25, 1938, c. 276, 52 Stat. 442; June 16, 1938, c. 489, 52 Stat. 767; June 20, 1939, c. 214, §2, 53 Stat. 842; Apr. 13, 1943, c. 62, §1, 57 Stat. 65."

* * * * *

Excerpt from Provisions of Federal Reserve Act relating to Election of Directors

(As set forth in United States Code, Title 12.)

12 U.S.C. §304.

"* * * whenever any two or more member banks within the same Federal reserve district are affiliated with the same holding company affiliate, participation by such member banks in any such nomination or election shall be confined to one of such banks, which may be designated for the purpose by such holding company affiliate. * * *

Dec. 23, 1913, c. 6, §4, 38 Stat. 254; Sept. 26, 1918, c. 177, §1, 40 Stat. 967; June 26, 1930, c. 614, 46 Stat. 815; June 16, 1933, c. 89, §3(b), 48 Stat. 163; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

* * * * *

**Excerpts from Federal Reserve Act, §9, Respecting
State Banks as Members of System**

(As set forth in United States Code, Title 12.)

12 U.S.C. §321. Application for membership

“Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal reserve system, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms ‘capital’ and ‘capital stock’ shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this title and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.

Any such State bank which on February 25, 1927, has established and is operating a branch or branches in conformity with the State law, may retain and operate the same while remaining or upon becoming a stockholder of such Federal reserve bank; but no such State bank may retain or acquire stock in a Federal reserve bank except upon relinquishment of any branch or branches established after

February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated: *Provided, however,* That nothing herein contained shall prevent any State member bank from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by national banks except that the approval of the Board of Governors of the Federal Reserve System, instead of the Comptroller of the Currency, shall be obtained before any State member bank may hereafter establish any branch and before any State bank hereafter admitted to membership may retain any branch established after February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated. Dec. 23, 1913, c. 6, §9, 38 Stat. 259; June 21, 1917, c. 32, §3, 40 Stat. 232; Feb. 25, 1927, c. 191, §9, 44 Stat. 1229; June 16, 1933, c. 89, §5(a), (b), 48 Stat. 164; June 16, 1934, c. 546, §2, 48 Stat. 971; Aug. 23, 1935, c. 614, §§203(a), 338, 49 Stat. 704, 721."

12 U.S.C. §322. Determination on application

"In acting upon such application the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this chapter. Dec. 23, 1913, c. 6, §9 (par.), as added June 21, 1917, c. 32, §3, 40 Stat. 232, and amended Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

12 U.S.C. §323. Stock in Federal reserve banks; method of payment

“Whenever the Board of Governors of the Federal Reserve System shall permit the applying bank to become a stockholder in the Federal reserve bank of the district its stock subscription shall be payable on call of the Board of Governors of the Federal Reserve System, and stock issued to it shall be held subject to the provisions of this chapter. Dec. 23, 1913, c. 6, §9, 38 Stat. 259; June 21, 1917, c. 32, §3, 40 Stat. 232; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704.”

12 U.S.C. §324. Laws applicable on becoming members

“All banks admitted to membership under authority of sections 321-338 of this title shall be required to comply with the reserve and capital requirements of this chapter and to conform to those provisions of law imposed on national banks which prohibit such banks from lending on or purchasing their own stock, which relate to the withdrawal or impairment of their capital stock, and which relate to the payment of unearned dividends. Such banks and the officers, agents, and employees thereof shall also be subject to the provisions of and to the penalties prescribed by section 592 of this title, and shall be required to make reports of condition and of the payment of dividends to the Federal reserve bank of which they become a member. Not less than three of such reports shall be made annually on call of the Federal reserve bank on dates to be fixed by the Board of Governors of the Federal Reserve System. Failure to make such reports within ten days after the date they are called for shall subject the offending bank to a penalty of \$100 a day for each day that it fails to transmit such report; such penalty to be collected by the Federal reserve bank

by suit or otherwise. Such reports of condition shall be in such form and shall contain such information as the Board of Governors of the Federal Reserve System may require and shall be published by the reporting banks in such manner and in accordance with such regulations as the said Board may prescribe. Dec. 23, 1913, c. 6, §9, 38 Stat. 259; June 21, 1917, c. 32, §3, 40 Stat. 232; Aug. 23, 1935, c. 614, §§203(a), 320, 49 Stat. 704, 713."

12 U.S.C. §325. Examinations

"As a condition of membership such banks shall likewise be subject to examinations made by direction of the Board of Governors of the Federal Reserve System or of the Federal reserve bank by examiners selected or approved by the Board of Governors of the Federal Reserve System. Dec. 23, 1913, c. 6, §9 (par.), as added June 21, 1917, c. 32, §3. 40 Stat. 232; and amended Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

12 U.S.C. §326. Acceptance of examinations and reports by State authorities; special examinations

"Whenever the directors of the Federal reserve bank shall approve the examinations made by the State authorities, such examinations and the reports thereof may be accepted in lieu of examinations made by examiners selected or approved by the Board of Governors of the Federal Reserve System: *Provided, however,* That when it deems it necessary the board may order special examinations by examiners of its own selection and shall in all cases approve the form of the report. The expenses of all examinations, other than those made by State authorities, may, in the discretion of the Board of Governors of the Federal Reserve System, be assessed against the banks examined and, when so assessed, shall be paid by the banks examined. Copies of the reports

of such examinations may, in the discretion of the Board of Governors of the Federal Reserve System, be furnished to the State authorities having supervision of such banks, to officers, directors, or receivers of such banks, and to any other proper persons. Dec. 23, 1913, c. 6, §9 (par.), as added June 21, 1917, c. 32, §3, 40 Stat. 232, and amended June 26, 1930, c. 611, §1, 46 Stat. 814; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

12 U.S.C. §327. Surrender of stock and cancellation of memberships

"If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of sections 321-338, inclusive, of this title, or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by said sections. Dec. 23, 1913, c. 6, §9, 38 Stat. 259; June 21, 1917, c. 32, §3, 40 Stat. 232; Apr. 23, 1930, c. 207, §2, 46 Stat. 251; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

12 U.S.C. §328. Withdrawals from membership

"Any State bank or trust company desiring to withdraw from membership in a Federal reserve bank may do so, after six months' written notice shall have been filed with the Board of Governors of the Federal Reserve System,

upon the surrender and cancellation of all of its holdings of capital stock in the Federal reserve bank: *Provided*, That the Board of Governors of the Federal Reserve System, in its discretion and subject to such conditions as it may prescribe, may waive such six months' notice in individual cases and may permit any such State bank or trust company to withdraw from membership in a Federal reserve bank prior to the expiration of six months from the date of the written notice of its intention to withdraw: *Provided, however*, That no Federal reserve bank shall, except under express authority of the Board of Governors of the Federal Reserve System, cancel within the same calendar year more than 25 per centum of its capital stock for the purpose of effecting voluntary withdrawals during that year. All such applications shall be dealt with in the order in which they are filed with the board. Whenever a member bank shall surrender its stock holdings in a Federal reserve bank, or shall be ordered to do so by the Board of Governors of the Federal Reserve System, under authority of law, all of its rights and privileges as a member bank shall thereupon cease and determine, and after due provision has been made for any indebtedness due or to become due to the Federal reserve bank it shall be entitled to a refund of its cash-paid subscription with interest at the rate of one-half of 1 per centum per month from date of last dividend, if earned, the amount refunded in no event to exceed the book value of the stock at that time, and shall likewise be entitled to repayment of deposits and of any other balance due from the Federal reserve bank. Dec. 23, 1913, c. 6, §9 (par.), as added June 21, 1917, c. 32, §3, 40 Stat. 232, and amended Apr. 17, 1930, c. 175, 46 Stat. 170; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

12 U.S.C. §329. Capital stock required as condition precedent to membership

"No applying bank shall be admitted to membership in a Federal reserve bank unless it possesses a paid-up unimpaired capital sufficient to entitle it to become a national banking association in the place where it is situated under the provisions of chapter 2 of this title: *Provided*, That this section shall not apply to State banks and trust companies organized prior to June 16, 1933, and situated in a place the population of which does not exceed three thousand inhabitants and having a capital of not less than \$25,000, nor to any State bank or trust company which is so situated and which, while it is entitled to the benefits of insurance under section 264 of this title, increases its capital to not less than \$25,000. Dec. 23, 1913, c. 6, §9, 38 Stat. 259; June 21, 1917, c. 32, §3, 40 Stat. 232; Mar. 4, 1923, c. 252, Title IV, §401, 42 Stat. 1478; June 16, 1933, c. 89, §17(b), 48 Stat. 185."

12 U.S.C. §329a. Waiver of requirements for membership

"In order to facilitate the admission to membership in the Federal Reserve System of any State bank which is required under subsection (y) of section 264 of this title to become a member of the Federal Reserve System in order to be an insured bank or continue to have any part of its deposits insured under such section 264, the Board of Governors of the Federal Reserve System may waive in whole or in part the requirements of this section relating to the admission of such bank to membership; *Provided*, That, if such bank is admitted with a capital less than that required for the organization of a national bank in the same place and its capital and surplus are not, in the judgment of the Board

of Governors of the Federal Reserve System, adequate in relation to its liabilities to depositors and other creditors, the said Board may, in its discretion, require such bank to increase its capital and surplus to such amount as the Board may deem necessary within such period prescribed by the Board as in its judgment shall be reasonable in view of all the circumstances: *Provided, however,* That no such bank shall be required to increase its capital to an amount in excess of that required for the organization of a national bank in the same place. Dec. 23, 1913, c. 6, §9, (par.), as added Aug. 23, 1935, c. 614, §202, 49 Stat. 704."

12 U.S.C. §330. Laws applicable on becoming members; discounts for State banks

"Banks becoming members of the Federal reserve system under authority of sections 321-338 of this title shall be subject to the provisions of sections 321-338 of this title and to those of this chapter which relate specifically to member banks, but shall not be subject to examination under the provisions of sections 481 and 482 of this title. Subject to the provisions of this chapter and to the regulations of the board made pursuant thereto, any bank becoming a member of the Federal reserve system shall retain its full charter and statutory rights as a State bank or trust company, and may continue to exercise all corporate powers granted it by the State in which it was created, and shall be entitled to all privileges of member banks: *Provided, however,* That no Federal reserve bank shall be permitted to discount for any State bank or trust company notes, drafts, or bills of exchange of any one borrower who is liable for borrowed money to such State bank or trust company in an amount greater than that which could be borrowed lawfully from such State bank or trust company were it a national banking association. The Federal reserve bank, as a condition of

the discount of notes, drafts, and bills of exchange for such State bank or trust company, shall require a certificate or guaranty to the effect that the borrower is not liable to such bank in excess of the amount provided by sections 321-338 of this title, and will not be permitted to become liable in excess of this amount while such notes, drafts, or bills of exchange are under discount with the Federal reserve bank. Dec. 23, 1913, c. 6, §9 (par.), as added June 21, 1917, c. 32, §3, 40 Stat. 232, and amended July 1, 1922, c. 274, 42 Stat. 821."

12 U.S.C. §331. Certifying checks on State banks admitted as members

"It shall be unlawful for any officer, clerk, or agent of any bank admitted to membership under authority of sections 321-338 of this title, to certify any check drawn upon such bank unless the person or company drawing the check has on deposit therewith at the time such check is certified an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against such bank, but the act of any such officer, clerk, or agent in violation of sections 321-338, inclusive, of this title, may subject such bank to a forfeiture of its membership in the Federal reserve system upon hearing by the Board of Governors of the Federal Reserve System. Dec. 23, 1913, c. 6, §9 (par.), as added June 21, 1917, c. 32, §3, 40 Stat. 232, and amended Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

12 U.S.C. §334. Reports from affiliates; penalty for failure to furnish

"Each bank admitted to membership under sections 321-338 of this title shall obtain from each of its affiliates other

than member banks and furnish to the Federal reserve bank of its district and to the Board of Governors of the Federal Reserve System not less than three reports during each year. Such reports shall be in such form as the Board of Governors of the Federal Reserve System may prescribe, shall be verified by the oath or affirmation of the president or such other officer as may be designated by the board of directors of such affiliate to verify such reports, and shall disclose the information hereinafter provided for as of dates identical with those fixed by the Board of Governors of the Federal Reserve System for reports of the condition of the affiliated member bank. Each such report of an affiliate shall be transmitted as herein provided at the same time as the corresponding report of the affiliated member bank, except that the Board of Governors of the Federal Reserve System may, in its discretion, extend such time for good cause shown. Each such report shall contain such information as in the judgment of the Board of Governors of the Federal Reserve System shall be necessary to disclose fully the relations between such affiliate and such bank and to enable the board to inform itself as to the effect of such relations upon the affairs of such bank. The reports of such affiliates shall be published by the bank under the same conditions as govern its own condition reports.

Any such affiliated member bank may be required to obtain from any such affiliate such additional reports as in the opinion of its Federal reserve bank or the Board of Governors of the Federal Reserve System may be necessary in order to obtain a full and complete knowledge of the condition of the affiliated member bank. Such additional reports shall be transmitted to the Federal reserve bank and the Board of Governors of the Federal Reserve System and shall be in such form as the Board of Governors of the Federal Reserve System may prescribe.

Any such affiliated member bank which fails to obtain from any of its affiliates and furnish any report provided for by the two preceding paragraphs of this section shall be subject to a penalty of \$100 for each day during which such failure continues, which, by direction of the Board of Governors of the Federal Reserve System, may be collected, by suit or otherwise, by the Federal reserve bank of the district in which such member bank is located. For the purposes of this paragraph and the two preceding paragraphs of this section, *the term 'affiliate' shall include holding-company affiliates as well as other affiliates.* Dec. 23, 1913, c. 6, §9 (par.), as added June 16, 1933, c. 89, §5(c), 48 Stat. 165, and amended Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704" (*Italics ours*).

12 U.S.C. §335. Dealing in investment securities; limitations and conditions

"State member banks shall be subject to the same limitations and conditions with respect to the purchasing, selling, underwriting, and holding of investment securities and stock as are applicable in the case of national banks under paragraph 'Seventh' of section 24 of this title. Dec. 23, 1913, c. 6, §9 (par.), as added June 16, 1933, c. 89, §5(c), 48 Stat. 165."

12 U.S.C. §336. Certificates of stock; representation of stock of other corporations

"After August 23, 1935, no certificate evidencing the stock of any State member bank shall bear any statement purporting to represent the stock of any other corporation, except a member bank or a corporation engaged on June 16, 1934, in holding the bank premises of such member bank, nor shall the ownership, sale, or transfer of any certificate

representing the stock of any State member bank be conditioned in any manner whatsoever upon the ownership, sale, or transfer of a certificate representing the stock of any other corporation, except a member bank or a corporation engaged on June 16, 1934 in holding the bank premises of such member bank: *Provided*, That sections 321-338 of this title shall not operate to prevent the ownership, sale, or transfer of stock of any other corporation being conditioned upon the ownership, sale, or transfer of a certificate representing stock of a State member bank. Dec. 23, 1913, c. 6, §9 (par.), as added June 16, 1933, c. 89, §5(c), 48 Stat. 165, and amended Aug. 23, 1935, c. 614, §310(b), 49 Stat. 710."

**12 U.S.C. §337. Holding company affiliates agree-
ments to be subject to voting restrictions; forfeiture of
membership on failure to file agreement**

"Each State member bank affiliated with a holding company affiliate shall obtain from such holding company affiliate, within such time as the Board of Governors of the Federal Reserve System shall prescribe, an agreement that such holding company affiliate shall be subject to the same conditions and limitations as are applicable under section 61 of this title, in the case of holding company affiliates of national banks. A copy of each such agreement shall be filed with the Board of Governors of the Federal Reserve System. Upon the failure of a state member bank affiliated with a holding company affiliate to obtain such an agreement within the time so prescribed, the Board of Governors of the Federal Reserve System shall require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership in the Federal Reserve System as provided in sections 321-338 of this title. Whenever the Board of Governors of the Federal

Reserve System shall have revoked the voting permit of any such holding company affiliate, the Board of Governors of the Federal Reserve System may, in its discretion, require any or all State member banks affiliated with such holding company affiliate to surrender their stock in the Federal reserve bank and to forfeit all rights and privileges of membership in the Federal Reserve System as provided in sections 321-338 of this title. Dec. 23, 1913, c. 6, §9 (par.), as added June 16, 1933, c. 89, §5(c), 48 Stat. 166, and amended Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704" (*Italics ours*).

12 U.S.C. §338. Examination of affiliates; forfeiture of membership on refusal of affiliate to give information or pay expense

"In connection with examinations of State member banks, examiners selected or approved by the Board of Governors of the Federal Reserve System shall make such examinations of the affairs of all affiliates of such banks as shall be necessary to disclose fully the relations between such banks and their affiliates and the effect of such relations upon the affairs of such banks. The expense of examination of affiliates of any State member bank may, in the discretion of the Board of Governors of the Federal Reserve System, be assessed against such bank and, when so assessed, shall be paid by such bank. In the event of the refusal to give any information requested in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, or in the event of the refusal to pay any expense so assessed, the Board of Governors of the Federal Reserve System may, in its discretion, require any or all State member banks affiliated with such affiliate to surrender their stock in the Federal reserve bank and to forfeit all

rights and privileges of membership in the Federal Reserve System, as provided in sections 321-338 of this title. Dec. 23, 1913, c. 6, §9 (par.), as added June 16, 1933, c. 89, §5(c), 48 Stat. 166, and amended Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

* * * * *

Excerpts from Provisions of Federal Reserve Act Relating to "Affiliates."

12 U.S.C. §371c. Loans to or purchase of securities of affiliates; collateral acceptable

"No member bank shall (1) make any loan or any extension of credit to, or purchase securities under repurchase agreement from, any of its affiliates, or (2) invest any of its funds in the capital stock, bonds, debentures, or other such obligations of any such affiliate, or (3) accept the capital stock, bonds, debentures, or other such obligations of any such affiliate as collateral security for advances made to any person, partnership, association, or corporation, if, in the case of any such affiliate, the aggregate amount of such loans, extensions of credit, repurchase agreements, investments, and advances against such collateral security will exceed 10 per centum of the capital stock and surplus of such member bank, or if, in the case of all such affiliates, the aggregate amount of such loans, extensions of credits, repurchase agreements, investments, and advances against such collateral security will exceed 20 per centum of the capital stock and surplus of such member bank.

Within the foregoing limitations, each loan or extension of credit of any kind or character to an affiliate shall be secured by collateral in the form of stocks, bonds, debentures, or other such obligations having a market value at the time of making the loan or extension of credit of at least 20 per centum more than the amount of the loan or extension of credit, or of at least 10 per centum more than the amount

of the loan or extension of credit if it is secured by obligations of any State or of any political subdivision or agency thereof: *Provided*, That the provisions of this paragraph shall not apply to loans or extensions of credit secured by obligations of the United States Government, the Federal intermediate credit banks, the Federal land banks, the Federal Home Loan Banks, or the Home Owners' Loan Corporation, or by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks. A loan or extension of credit to a director, officer, clerk, or other employee, or any representative of any such affiliate, shall be deemed a loan to the affiliate to the extent that the proceeds of such loan are used for the benefit of or transferred to the affiliate.

For the purpose of this section, the term 'affiliate' shall include holding-company affiliates as well as other affiliates, * * *. Dec. 23, 1913, c. 6, §23A, as added June 16, 1933, c. 89, §13, 49 Stat. 183, and amended Aug. 23, 1935, c. 614, §327, 49 Stat. 717."

* * * * *

12 U.S.C. §486. Waiver of requirements as to reports from or examinations of affiliates

"Whenever member banks are required to obtain reports from affiliates, or whenever affiliates of member banks are required to submit to examination, the Board of Governors of the Federal Reserve System or the Comptroller of the Currency, as the case may be, may waive such requirements with respect to any such report or examination of any affiliate if in the judgment of the said Board or Comptroller, respectively, such report or examination is not necessary to disclose fully the relations between such affiliate and such bank and the effect thereof upon the affairs of such bank. Dec. 23, 1913, c. 6, §21 (par.), as added Aug. 23, 1935, c. 614, §325, 49 Stat. 715.

12 U.S.C. §221a. Same (Definitions); extension

“(c) The term ‘holding company affiliate’ shall include any corporation, business trust, association, or other similar organization—

(1) Which owns or controls, directly or indirectly, either a majority of the shares of capital stock of a member bank or more than 50 per centum of the number of shares voted for the election of directors of any one bank at the preceding election, or controls in any manner the election of a majority of the directors of any one bank; or

(2) For the benefit of whose shareholders or members all or substantially all the capital stock of a member bank is held by trustees.

Notwithstanding the foregoing, the term ‘holding company affiliate’ shall not include (except for the purposes of section 371c of this title) any corporation all of the stock of which is owned by the United States, or any organization which is determined by the Board of Governors of the Federal Reserve System not to be engaged, directly or indirectly, as a business in holding the stock of, or managing or controlling, banks, banking associations, savings banks, or trust companies. June 16, 1933, c. 89, §2, 48 Stat. 162; Aug. 23, 1935, c. 614, §301, 49 Stat. 707.”

Excerpts from Banking Act of 1933 Relating to Penalties for "Unsafe or Unsound Practices" in Business of a State Member Bank.

(As set forth in United States Code, Title 12.)

12 U.S.C. §77. Removal of director or officer

"Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal

Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than five years, or both, in the discretion of the court. June 16, 1933, c. 89, §30, 48 Stat. 193; Aug. 23, 1935, c. 614 §203(a), 49 Stat. 704."

Excerpts from Banking Act of 1933 Relating to Supervision by Board of Governors of Federal Reserve System over Voting Permits to Holding Company Affiliates of National Banks

(As set forth in United States Code, Title 12.)

12 U.S.C. §61. Right of shareholders to vote; holding company affiliates; voting permits

"In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each

shareholder shall be entitled to one vote on each share of stock held by him; except that (1) this shall not be construed as limiting the voting rights of holders of preferred stock under the terms and provisions of articles of association, or amendments thereto, adopted pursuant to the provisions of section 51b of this title, (2) in the election of directors, shares of its own stock held by a national bank as sole trustee, whether registered in its own name as such trustee or in the name of its nominee, shall not be voted by the registered owner unless under the terms of the trust the manner in which such shares shall be voted may be determined by a donor or beneficiary of the trust and unless such donor or beneficiary actually directs how such shares shall be voted, (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee, and (4) *shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association.* Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such bank shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee, such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares.

For the purposes of this section *shares shall be deemed to*

be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its shareholders so to vote the same. The Board of Governors of the Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations between such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunc-

tion with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

(b) After five years after June 16, 1933, every such holding company affiliate (1) shall possess, and shall continue to possess during the life of such permit, free and clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

(c) Notwithstanding the foregoing provisions of this section, after five years after June 16, 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it, and (2) the assets required by this section to be pos-

sessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be made up within such period as the Board of Governors of the Federal Reserve System may by regulation prescribe and the provisions of this subsection, instead of subsection (b), shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock;

(d) Every officer, director, agent, and employee of every such holding company affiliate shall be subject to the same penalties for false entries in any book, report, or statement of such holding company affiliate as are applicable to officers, directors, agents, and employees of member banks under section 592 of this title; and

(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as 'securities company'); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within

five years after the filing of such application divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings.

If at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days' notice by registered mail of its intention to the holding company affiliate and affording it an opportunity to be heard. Whenever the Board of Governors of the Federal Reserve System shall have revoked any such voting permit, no national bank whose stock is controlled by the holding company affiliate whose permit is so revoked shall receive deposits of public moneys of the United States, nor shall any such national bank pay any further dividend to such holding company affiliate upon any shares of such bank controlled by such holding company affiliate.

Whenever the Board of Governors of the Federal Reserve System shall have revoked any voting permit as hereinbefore provided, the rights, privileges, and franchises of any or all national banks the stock of which is controlled by such holding company affiliate shall, in the discretion of the Board of Governors of the Federal Reserve System, be subject to forfeiture in accordance with section 501a of this title. R. S. §5144; June 16, 1933, c. 89, §19, 48 Stat. 186; Aug. 23, 1935, c. 614, §§203(a), 311, 49 Stat. 704, 710."

**Excerpt From Provisions of Federal Reserve Act
Relating to Directors of Federal Reserve Banks.**

(As set forth in United States Code, Title 12.)

**12 U. S. C. §301. Powers and duties of board of directors;
suspension of member bank for undue use of bank credit**

Every Federal reserve bank shall be conducted under the supervision and control of a board of directors.

The board of directors shall perform the duties usually appertaining to the office of directors of banking associations and all such duties as are prescribed by law.

Said board of directors shall administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and may, subject to the provisions of law and the orders of the Board of Governors of the Federal Reserve System, extend to each member bank such discounts, advancements, and accommodations as may be safely and reasonably made with due regard for the claims and demands of other member banks, the maintenance of sound credit conditions, and the accommodation of commerce, industry, and agriculture. The Board of Governors of the Federal Reserve System may prescribe regulations further defining within the limitations of this chapter the conditions under which discounts, advancements, and the accommodations may be extended to member banks. Each Federal reserve bank shall keep itself informed of the general character and amount of the loans and investments of its member banks with a view to ascertaining whether undue use is being made of bank credit for the speculative carrying of or trading in securities, real estate, or commodities, or for any other purpose inconsistent with the maintenance of sound credit conditions; and, in determining

whether to grant or refuse advances, rediscounts, or other credit accommodations, the Federal reserve bank shall give consideration to such information. The chairman of the Federal reserve bank shall report to the Board of Governors of the Federal Reserve System any such undue use of bank credit by any member bank, together with his recommendation. Whenever, in the judgment of the Board of Governors of the Federal Reserve System, any member bank is making such undue use of bank credit, the Board may, in its discretion, after reasonable notice and an opportunity for a hearing, suspend such bank from the use of the credit facilities of the Federal Reserve System and may terminate such suspension or may renew it from time to time. Dec. 23, 1913, c. 6, §4, 38 Stat. 254; June 16, 1933, c. 89, §3(a), 48 Stat. 163; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704 (*Italics ours*).

Declaratory Judgment Act

(As set forth in United States Code, Title 28)

28 U.S.C. §400. Declaratory judgments authorized; procedure

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdic-

tion to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, §274d, as added June 14, 1934, c. 512, 48 Stat. 955, and amended Aug. 30, 1935, c. 829, §405, 49 Stat. 1027.)

Excerpts from Federal Rules of Civil Procedure

Rule. 8. General Rules of Pleading * * *

“(d) **Effect of failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.”

Rule 20. Permissive Joinder of Parties

“(a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common

to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Extracts from Letter Submitted by Vice Governor Edmund Platt to Chairman McFadden of the House Committee on Banking and Currency Dated February 2, 1926, Quoted at pp. 38-45 of Transcript of "Hearings before a Sub-committee of the Committee on Banking and Currency, United States Senate, 69th Congress, first session, on S. 1782 and H.R. 2" Held February 16, 17, 18 and 24, 1926

"* * * the board has no hesitancy in expressing its unqualified disapproval of this proposed amendment.

* * * * *

"(3) The proposed amendment would forbid the Federal reserve board to impose any condition or restriction upon any State bank other than those under which national banks shall operate. (This is unnecessary and unimportant, because the board never has prescribed any conditions of membership restricting a State bank to any greater extent than national banks are restricted by law.)

Practical Effect of Proposed Amendment.

"The Federal reserve board is strongly opposed to this amendment because it would deprive the board of a power

which it believes to be necessary to enable the board to maintain a high standard of membership in the Federal reserve system and which it has always exercised temperately and reasonably. The wisdom of the possession of this power by the Federal reserve board and the fairness with which it has been exercised have been generally recognized by the banking fraternity and until recently there has been no opposition to it. Moreover, as will be shown below, such opposition as now exists is based upon a misconception of the facts regarding the scope and exercise of this power.

"Most of the conditions of membership prescribed by the board are designed to carry out the purpose of that provision of section 9 of the Federal reserve act which provides that in acting upon applications of State banks for membership in the Federal reserve system, the Federal Reserve Board shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of the Federal reserve act. In other words, they are designed to require the member bank to keep its management and financial condition sound after admission to the system and not to acquire and exercise additional corporate powers which might be inconsistent with the purposes of the act.

* * * * *

"Conditions which have been prescribed for State banks and trust companies coming into this system have been found by the board to be effective in serving the purpose desired, and on the basis of the results obtained in the past the board believes that its policy of prescribing such conditions of membership is entirely sound and one which it seems advisable to continue in the future. The wisdom and

necessity of the practice has long been recognized and acquiesced in by the banking fraternity; and, as will be shown below, Congress has impliedly approved it by amending the law so as expressly to authorize it.

* * * * *

“The organization committee of the Federal Reserve Board, under such rules and regulations as it may prescribe, subject to the provisions of this section, may permit the applying bank to become a stockholder in the Federal reserve bank of the district in which the applying bank is located.’

“Acting under authority of this provision the board has always understood that it has the power to prescribe for State banks admitted to membership such conditions as in its discretion it deems necessary or advisable. It acted on the theory that, even if this power were not included in the power to prescribe rules and regulations, it was an incident of the power to approve or reject the application of any particular State bank, in the board’s discretion. In other words, it acted in the theory that the discretionary power to approve or reject any application included the power to approve any application subject to such reasonable and proper conditions as the board might prescribe.

CONCLUSION.

“In conclusion I wish to say that the board has no desire to be autocratic or unreasonable in this matter and is always willing to hear and give due weight to the views of State banks and State banking authorities with reference to the expediency and reasonableness of its regulations and the conditions of membership prescribed by it. The board, however, has found by experience that the power to prescribe conditions of membership governing State banks organized

under the divergent laws of 48 different States is absolutely essential to the preservation of a high standard of membership in the Federal reserve system; and for this reason, the board is strongly opposed to the amendment proposed by the National Association of Supervisors of State banks or any other amendment which would take away or seriously impair the exercise of this power. The board, however, has no objection to an amendment such as that contained in section 10 of your bill (H. R. 2) as originally introduced, which would provide that the board 'shall not prescribe any condition of membership which will prevent the applying bank from competing with national banks on a basis of substantial equality or which will subject the applying bank to any greater limitations or restrictions than those under which national banks shall operate'; because the board never has and never would prescribe any such discriminatory condition of membership."

Extract from Testimony of Dr. Henry P. Willis and Comments of Senator Glass Thereon at pp. 123-125 of Printed Transcript of Hearings Before a Sub-committee of the Committee on Banking and Currency, United States Senate, 69th Congress, First Session, on S. 1782 and H.R. 2, Held February 16, 17, 18 and 24, 1926.

"Dr. Willis: * * * I believe that the Association of State Bank Supervisors, to which some reference has been made here this morning, requested the insertion of the following in H.R. 2:

The Federal Reserve Board, subject to the provisions of this act and such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a stockholder of such Federal reserve banks; *Provided, however,* That such conditions or regulations shall not

limit or impair the charter or statutory rights and powers of such bank, nor shall the Federal Reserve Board,

And so forth. Now you will notice that the essential effect of that amendment, had it been made—and by the way I do not present it in any official way in behalf of the State bank authorities; I merely pick it up, I think in a correct form, but simply on my own authority, for the purpose of discussion—you will notice that that provision essentially states that the Federal Reserve Board, in admitting banks to the Federal reserve system, shall do it pursuant to the provisions of this act.

In the form in which H. R. 2 first appeared in the House of Representatives, shortly after the opening of the present session, an amendment was inserted designed to meet the wishes of the State bank authorities, but that amendment omitted the words 'subject to the provisions of this act,' so that the language with which they were not satisfied simply gave to the board the right to regulate the admission to the Federal reserve system, subect to such conditions as it might prescribe.

I shall not attempt to discuss in any detail the question whether any administrative board should ever have given to it the right to prescribe regulations on such an important subject that are not pursuant to the provisions of some act of Congress.

Senator Glass: That is what the board has done.

Doctor Willis: Yes, sir.

Senator Glass: It has usurped the legislative functions of Congress.

Doctor Willis: It is proper for you to use that expression, but perhaps not for me, here. I merely state that that is what it has been doing; it has been making regulations not pursuant to the provisions of the act."

* * * * *

"Doctor Willis: I was recommending that the board be allowed to make regulations, subject to the provisions of this act. Those words were in the original Federal reserve act.

Senator Glass: They were dropped out inadvertently. Certainly without the knowledge of some of us who were very careful about it.

Doctor Willis: Can there be anyone who will contend it was wrong to put into the act that the board should conduct itself pursuant to the provisions of this act? If it could conduct itself otherwise, what is the use of the act at all?

I think there is no doubt at all that those words should be put in there and if Congress wishes to leave to the board wide latitude to do as it pleases, then it should specifically state that the board may exercise its powers without reference to this act."

* * * * *

"The Chairman: This thought occurs to me, that the policy which you think was improvidently or without legal authority represented by the regulation of the Federal Reserve Board—that policy would be crystalized into law by an act of Congress if this bill or some modification of it were to become effective, would it not?

Doctor Willis: Except this bill, in the proposed section 9, leaves it to the board to make such regulations as it sees fit and expressly leaves out, as I have explained, the words 'pursuant to the provisions of this act.'

The Chairman: That is the provision which I think Senator Glass either did propose or was about to propose to the Senate bill last year.

Doctor Willis: And which your committee recommended.

Senator Glass: Which I did propose and the committee adopted it.

Doctor Willis: It is contained in the official draft and I

highly approve of the substitute which your committee recommended.

Senator Glass: It was in the original Federal reserve act and how it got out I do not understand.

Doctor Willis: Put those words in there and it will be impossible for the Federal Reserve Board to put banks out of the system because they have branch banks."

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9338

493

PEOPLES BANK, *Appellant,*

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S.
SZYMCAK, JOHN K. McKEE, ERNEST G.
DRAPER AND RUDOLPH M. EVANS, *Appellees.*

Appeal from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

FILED OCT 7 1946

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9338.

PEOPLES BANK, *Appellant*,

v.

MARRINER S. ECCLES, RONALD RANSOM, M. S.
SZYMCZAK, JOHN K. McKEE, ERNEST G.
DRAPER AND RUDOLPH M. EVANS, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This case comes before the Court on appeal from a judgment entered below dismissing appellant's complaint. The sole question presented is whether the allegations of that complaint, read together with any relevant or admissible facts contained in the affidavits of record in the case, state any appropriate claim for relief.

The facts may be briefly stated. Appellant is a banking corporation organized under the laws of the State of California. Appellees are the individual members of the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board). In 1941 appellant applied to the Board for membership in the Federal Reserve System (hereinafter referred to as the System). In May 1942 appellant was admitted to System membership upon the following condition among others:

“4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, of any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System.”

The complaint shows that, subsequent to appellant's admission to System membership, a number of its shares were acquired by and registered on appellant's books in the name of Transamerica Corporation. These shares, it is alleged, were acquired by Transamerica without appellant's knowledge and consent and without the approval of the Board.

Upon the basis of these facts appellant sought a declaratory judgment that Condition No. 4 is invalid and an injunction restraining appellees from taking any steps to enforce it. Appellees moved to dismiss the complaint on the ground that, as they had not taken any steps to enforce the Condition, no justiciable controversy was presented by the pleadings. This motion was denied. See Memorandum Opinion of Justice Holtzoff (App. 11-23).¹

¹ This and similar references are to pages of Joint Appendix.

Thereafter appellees filed their joint and several answer in which they set forth two defenses. The first is that appellant, having enjoyed for almost four years the benefits of System membership which resulted from its voluntary acceptance of Condition No. 4, is now estopped from challenging the validity of the Condition. The second defense is that the complaint fails to state facts upon which any relief can be granted.

On this state of the record appellees moved for judgment on the pleadings (App. 25). Appellant countered with a motion for summary judgment, filing a number of affidavits in support of such motion (App. 25-109). It was stipulated below that all relevant and admissible facts contained in such affidavits might be considered by the court in deciding both motions (App. 111). On June 3, 1946, Mr. Justice Bailey, before whom these motions were argued below, filed a memorandum opinion granting appellees' motion for judgment on the pleadings and denying that of appellant for summary judgment (App. 113).

SUMMARY OF ARGUMENT.

Appellees will show:

(1) The complaint fails to state a justiciable controversy because there is no allegation that appellees have acted under Condition No. 4 or that they have threatened to take action thereunder. An indispensable element of justiciability in declaratory judgment actions against public officers is a showing that such officers have taken, or have threatened to take, some action which is harmful to the plaintiff. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 325, 80 L. Ed. 688; *Helco Products Co. v. McNutt*, 78 App. D. C. 71, 137 F. (2d) 681.

(2) Appellant is estopped from challenging the validity of Condition No. 4. The record shows that, in order to secure the benefits and privileges of System membership, appellant voluntarily accepted and agreed to the Condition.

As found by the court below, there is "nothing contrary to public policy in the condition" and it "is clearly not one outside the domain of the Federal Government." By thus voluntarily accepting the Condition appellant waived its right, if any, to challenge it and is, therefore, estopped to assert that right now. *White Star Bus Line v. People of Puerto Rico*, 75 F. (2d) 889 (C. C. A. 1st), cert. den. 296 U. S. 606; *Pierce Oil Corporation et al. v. Phoenix Refining Company*, 259 U. S. 125, 66 L. Ed. 855; *United Fuel Gas Company v. Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390; *St. Louis Malleable Casting Company v. Pendergast Construction Company*, 260 U. S. 469, 67 L. Ed. 351; *Hurley v. Commission of Fisheries*, 257 U. S. 223, 66 L. Ed. 206.

(3) The Condition is valid. In the first place, it is presumed to be valid, and appellant has alleged no facts which overcome that presumption. Cf. *Lucking v. Delano*, 74 App. D. C. 134, 122 F. (2d) 21. In the second place, the Federal Reserve Act specifically authorizes the Board to impose conditions of membership. Because of the many and wholly intangible considerations which the Board is required by statute to consider in passing upon membership applications, including "character of management," "financial condition," etc., the power to impose conditions necessarily involves an informed and particularized discretion. The rule is clear that the courts will not substitute their judgment for that of an administrative body in a matter involving the exercise of judgment and discretion. *Apfel v. Mellon, et al.*, 59 App. D. C. 94, 33 F. (2d) 805, cert. den. 280 U. S. 585; *Adams v. Nagle*, 303 U. S. 532. In this case the record shows that the board had reason to believe that appellant, at the time it applied for membership in the System, was under or was about to come under the management of Transamerica Corporation, the bank expansion program of which the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation all believed to be unsound. Condition No. 4 was therefore designed to prevent that corporation from taking over appellant's affairs *after* it came into the System. Thus the

Condition is directly related to "management" and "financial condition," two of the subjects which the Board is specifically required to consider in passing upon membership applications. Under such circumstances the Condition has even that direct statutory sanction which appellant's argument would require.

ARGUMENT.

I.

APPELLANT'S ACTION IS PREMATURE.

As pointed out above, appellees moved to dismiss the complaint below on the ground that the action was prematurely brought. The lower Court in an extended opinion overruled this contention (App. 11-23). However, we believe our position to be well taken on this point and, as our argument goes to the jurisdiction of the lower Court to entertain the suit, we shall briefly discuss it at the outset of our brief.

In determining upon Condition No. 4 the Board acted in a perfectly routine manner² and pursuant to its express statutory power to impose conditions of membership.³ That power was conferred upon the Board by Congress for the obvious purpose of protecting the System against potentially unsafe and unsound banking situations. Congress recognized, however, that each membership application would pose its own peculiar problems, and it therefore left it to the Board to determine, in the light of its expert appraisal of all the facts and within the broad standards fixed by the Act, what conditions might be necessary to meet particular cases. Here it is apparent that the Board, in approving appellant's application, nevertheless was concerned lest Transamerica Corporation, the bank expansion

² The Court will take judicial notice of Regulation H of the Board, which concerns the admission of State Banks to the System. Section 6 of that Regulation prescribes three standard conditions of membership and provides that the Board will prescribe "such other conditions as may be considered necessary or advisable in the particular case."

³ See discussion *post*, p. 29, et seq.

program of which the Board at that time considered unsound, might obtain a voice in appellant's management.

Condition No. 4, however, is not self-executing, as appears on its face. And the Board, in affixing the Condition in the light of the opinion which it then entertained as to the potential danger of Transamerica affiliation, did not by so acting declare in advance what its administrative decision might be if and when Transamerica should acquire some of appellant's shares. In affixing the Condition—by agreement with appellant—the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto. Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced.

Nor can it be argued that the Condition itself constitutes a threat of present or future action by the Board. In the first place, the express requirement of a "written notice" as a condition precedent to appellant's obligation to withdraw from the System belies any such construction. Appellant has 60 days following the receipt of such "written notice" to elect whether or not to abide by its agreement.⁴ Such a period affords ample time for it to test its right, if any, to have the courts consider the Condition. And in the second place, the Board's failure thus far to take any action under the Condition, even though now justified by the facts, is conclusive proof that the Board did not prejudge the matter at the time the Condition was agreed upon.

In this posture of the case we think it clear that no "case" or "controversy" of a justiciable nature is presented for the Court's determination. There has been neither action

⁴ Even should appellant, if and when it receives such notice, take no action pursuant thereto, its membership could not be summarily forfeited. Section 9 of the Act (46 Stat. 250, 251, c. 207, U. S. C., Title 12, § 327) provides that, while the Board may order such a forfeiture, it can only do so "after hearing" and a finding that appellant "has failed to comply with the provisions of . . . [the law] or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto . . ." Appellant's alleged danger is thus rendered even more remote.

under the Condition nor a threat to take such action by these appellees. And the need for such action may never arise. Consequently it appears that appellant is attempting to secure judicial determination of a matter as to which admittedly there is a difference of opinion between itself and the Board (although that difference apparently did not exist when the condition was agreed upon) but which has not yet reached an adversary stage in the judicial sense, and may never do so.

The authorities seem clearly to establish that where, as here, governmental policy is attacked in an action for declaratory relief, an indispensable element of justiciability is a showing of either positive action or a threat to take such action by the responsible officials involved. One of the latest expressions of the Supreme Court on this subject is contained in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936). There, among other relief, plaintiffs sought a declaratory judgment concerning the validity of certain policies previously determined by the Tennessee Valley Authority. In refusing to render such a decision, the Supreme Court significantly stated:

“The pronouncements, policies, and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy *save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining.* * * * At the last term the Court held, in dismissing the bill of the United States against the state of West Virginia, that general allegations that the state challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue ‘too vague and ill-defined to admit of judicial determination.’ *United States v. State of West Virginia*, 295 U. S. 463, 474, 55 S. Ct. 789, 79 L. Ed. 1546. Claims based merely upon ‘assumed potential invasions’ of rights are not enough to warrant judicial intervention.

Arizona v. California, 283 U. S. 423, 462, 51 S. Ct. 522, 75 L. Ed. 1154.”⁵ (Italics ours)

In the case of *Helco Products Co. v. McNutt*, 78 App. D. C. 71, 137 F. (2d) 681 (1943), this Court took occasion to refer to the language of the Supreme Court just quoted. In the *Helco* case, the plaintiff sought a declaratory judgment against the Federal Security Administrator and the Attorney General. The Company proposed to ship in interstate commerce certain seeds to which it intended to add a blue coloring by means of a harmless vegetable dye. It explained its intention of so doing to the Food & Drug Administration, which informed the company that, in the opinion of the Administration, such an artificially colored product would be “adulterated” within the meaning of the Federal Food, Drug, and Cosmetic Act and that an interstate shipment of such an adulterated product would constitute a violation of the Act. On the basis of these facts plaintiff sought a declaratory judgment, but this Court held that the complaint did not present a justiciable controversy because there had as yet been no threat of action by any governmental official sufficient to justify judicial intervention. The Court said:

“Appellant concedes that the Agnew case, and others, speak in terms of an official threat of enforcement, as a requisite of justiciability in declaratory judgment actions. But appellant would distinguish the present case on the theory that: ‘In the case at bar the Administrator has the authority and as a matter of law has officially threatened to prosecute the appellant or to seize and libel its merchandise.’ ”

⁵ Compare *National Labor Relations Board v. Montgomery Ward & Co.*, 79 App. D. C. 200, 144 F. (2d) 528 (cert. den. 323 U. S. 774) wherein this Court refused jurisdiction to annul and enjoin enforcement of a directive order of the War Labor Board on the ground, *inter alia*, that no facts were alleged in the complaint showing a threat by defendants to take action pursuant to such order. While that was a suit for injunction, the Supreme Court has recently stated that “the same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment.” See *Macauley v. Waterman Steamship Corp.*, 66 S. Ct. 712, 714, and cases there cited.

The Court then went on to demonstrate that appellant's contention that there had been a threat was not well founded. It then added the following:

"We conclude that the present case was not an appropriate one for a declaratory judgment and that there is no showing of abuse of discretion in the action of the District Court dismissing the complaint. The Supreme Court has said the pronouncements, policies, and programs of a government administrative agency do not give rise to a justiciable controversy, save as they have fruition in action of a definite and concrete character, constituting an actual or threatened interference with the rights of persons complaining."

To the same effect see *John P. Agnew & Co. v. Hoage*, 69 App. D. C. 116, 99 F. (2d) 349; *Blue Star Auto Stores v. Fleming et al.*, 50 F. Supp. 928 (decision by Justice Bailey below, cited with approval by this Court in the *Helco* case); *Babbitt Auto Parts Co. v. Fleming*, 51 F. Supp. 360 (decision by Justice Morris below, also cited with approval in the *Helco* case); *Southern Pacific Co. v. Conway*, 115 F. (2d) 746 (C. C. A. 9th, 1940); *Boggus Motor Co. v. Onderdonk*, 9 F. Supp. 950 (D. C. Texas, 1935); *F. W. Maurer & Sons Co. v. Andrews*, 30 F. Supp. 637 (D. C. Penna. 1939; also cited with approval in the *Helco* case); *Redlands' Foot-hills Groves v. Jacobs*, 30 F. Supp. 995 (D. C. Cal. 1940).⁶

All of the cases cited above arose under the Declaratory Judgment Act. All of them were suits against either public officials or governmental agencies. All of them were decided against the plaintiffs because their claims lacked justiciability. And in all of them the courts took occasion to emphasize the absence of any showing of action or

⁶ See also *Peoples Bank v. Federal Reserve Bank of San Francisco et al.*, 58 F. Supp. 25 (app. dismissed 149 F. (2d) 850), where appellant sought, by suit brought in the District Court in San Francisco, to have Condition No. 4 declared invalid. There appellant joined as defendants the Board, the Federal Reserve Agent, and the Federal Reserve Bank of San Francisco. The case was dismissed as to all. In the course of its opinion the Court took occasion to point out that "the complaint presents a case of anticipated, possible injury, based, it seems largely, upon conjecture and not such a case of immediate and impending danger as would warrant injunctive relief."

presently threatened action on the part of the defendants in support of their decisions. We submit that the same basic jurisdictional defect is present here and that the cases cited above are controlling on this point.

The opinion below, without discussing any of these cases separately, disposes of them in a general statement consisting of one paragraph (App. 21-22). Furthermore the opinion below does not discuss at all the sole argument in support of which those cases were cited, namely, that in cases of this kind the complaint must show a threat of official action harmful to the plaintiff. The closest the court below came to considering this point was in that part of its opinion (App. 20) wherein it pointed out that "events have created a situation enabling the defendants *to invoke the condition.*" (Italics ours) The opinion then states that appellant "has made a demand on the Board of Governors for its cancellation" and that the Board "maintains the validity of the condition."

But these observations do not meet the test of justiciability. At most they disclose only a disagreement between appellant and these appellees concerning the validity of the Condition. As we have seen, however, a mere disagreement does not create an "actual controversy" under the Declaratory Judgment Act. Nor can such a controversy "be created by taking a position and then challenging the Government to dispute it." *F. W. Maurer & Sons Co. v. Andrews*, supra. And even assuming, *arguendo*, that the Condition is invalid, nevertheless before appellees can be charged with any *personal* wrongdoing there must be some showing of their present intention to take action harmful to appellant pursuant to the Condition. Cf. *Southern Pacific Co. v. Conway*, supra.

For the reasons outlined above we submit that appellant's action is premature and does not present an "actual controversy" within the meaning of the Federal Declaratory Judgment Act.

II.

**APPLICANT IS ESTOPPED FROM CHALLENGING
THE VALIDITY OF CONDITION NO. 4.**

Justice Bailey sustained the contention of appellees below that appellant is estopped by its own official acts from challenging the validity of Condition No. 4. We submit that both the record and the authorities fully sustain the decision of the lower court on this point.

Appellant's application for membership was filed with the Board on December 2, 1941 (App. 40). On February 14, 1942, the Board rejected appellant's application (App. 49). The inference is clear, from the text of an affidavit filed by appellant in support of its motion for summary judgment (App. 61), that the Board's unwillingness to approve the application at that time was due to its impression that appellant was to be under the ownership or control of Transamerica Corporation. Thereafter appellant renewed its application by a letter dated February 20, 1942, formally requesting the Board to reconsider its decision, and calling attention to the fact that a number of changes had been effected in the placement of its corporate shares (App. 50-51).

The record further shows that following its receipt of appellant's letter of February 20, 1942, the Board, under date of March 11, 1942, notified appellant that its application would be reconsidered *if appellant could demonstrate—*

“1. That arrangements have been made by Mr. John S. Griffith, San Marino, California, for financing the purchase of his stock in a manner different from that in effect at the time of our investigation of your bank's application for membership, and that such arrangements are consistent with the other provisions of this letter.

“2. That some change has been made in the arrangements for the use of the furniture and fixtures whereby the bank will be under no obligation to Capital Company or any other part of the Transamerica group.

"3. That neither Transamerica Corporation nor any organization affiliated or closely identified with Transamerica Corporation or any other bank holding company group has any interest, direct or indirect, in the applicant bank, and that the bank is in no manner obligated to any such organization.

"4. That all stockholders have stated in writing that they have no agreements or understandings, expressed or implied, with respect to the sale or transfer of the stock of the bank to any such organization, and that they do not intend to enter into any such agreements or understandings.

"5. That the bank was organized as a bona fide local, independent institution, and is expected to be continued as such." (App. 53-54)

Far from objecting to these requirements, the record further shows that appellant, as a means of securing Board reconsideration of its application, voluntarily complied with all of them. Under date of April 23, 1942, appellant sent to the Federal Reserve Bank of San Francisco (1) a statement by Mr. Griffith relative to the refinancing of his shares of appellant's stock, (2) a declaration signed by all of appellant's directors that appellant was "organized as a bona fide local, independent institution," and that it was not obligated in any manner to Transamerica Corporation or to any of its affiliated companies, and (3) a signed statement of each stockholder that he had no arrangements respecting the sale or transfer of his shares to Transamerica or any of its affiliated companies and that he did not intend to enter into any such arrangements in the future (App. 54-58).

Based upon the representations thus made to it by the bank and by all of its directors and stockholders, the Board, under date of May 6, 1942, notified the appellant that its application had been approved subject to a number of conditions, including Condition No. 4. Before membership status could attach, however, appellant was required to evidence its acceptance of the conditions by formal resolu-

tion, a certified copy of which was to be filed with the Federal Reserve Bank of San Francisco (App. 58-61).

It is thus to be seen that at no time during the period when appellant was seeking System membership did it raise any question as to the power of the Board to require Condition No. 4. On the contrary, the facts above recited plainly show that appellant was then fully satisfied—indeed eager—to embrace the condition as a means of securing such membership. As a consequence of its then position, appellant has ever since enjoyed and is today continuing to enjoy all of the valuable rights and privileges which flow therefrom.⁷ Now, however, four years after it sought and obtained the favorable action of these appellees, appellant wishes to repudiate its voluntary action in accepting the condition without challenge; it now wants to retain the benefits but shed the obligations which it thus voluntarily assumed. Surely the administrative agencies of the Government are entitled to expect at least the same standards of conduct on the part of those with whom they deal as the law requires in dealings between private citizens. Yet in no view of the matter can it be said that appellant's conduct measures up to such standards. Its attempt to "play fast and loose with illegality" hardly recommends itself to the discretionary intervention of a court of law.

There is no need here to distinguish between the various kinds of estoppel, nor to review the many cases, both State

⁷ To mention some of the advantages which accrue to a bank as a result of its admission to the System: It can borrow at its Federal Reserve Bank at any time on any sound asset; it can obtain currency promptly and dependably from its nearby Federal Reserve Bank or branch without carriage charge; it collects and clears checks, drafts, bills, etc., through the nationwide clearing system of the twelve Federal Reserve Banks and their twenty-four branches; it can effect prompt telegraphic transfers of funds through the Federal Reserve Bank or branch; it has the use of Federal Reserve Bank facilities in buying and selling Government securities; it has the privilege of depositing its securities in the vaults of the Federal Reserve Bank for safekeeping, collection of interest coupons, redemption, etc. In addition to these important available services, a member bank has a prime investment in its holding of Federal Reserve Bank stock, which pays a six per cent dividend. Furthermore, System membership automatically entitles a member bank to Federal deposit insurance coverage. And there is always the prestige of membership in a nationwide organization, established by Congress, whose members hold the great bulk of the banking resources of the country.

and Federal, in which the varying judicial concepts of estoppel have been applied. The record presented by this case is precisely analogous to that which was before the court in *White Star Bus Line v. People of Puerto Rico*, 75 F. (2d) 889 (C. C. A. 1st), cert. den. 296 U. S. 606. This was a suit brought by the People of Puerto Rico to recover from defendant bus line a royalty which the latter agreed to pay as a condition to receiving a license to operate its line. The record disclosed that in 1929 the bus line applied to the Public Service Commission for the right to operate between San Juan and Rio Piedras. The Commission insisted upon the payment of royalties on a graduating scale over the life of the license. The bus line refused to accept these conditions and suggested certain changes. *It also protested the imposition of the royalties as exceeding the authority of the Commission.* A hearing was held and the Commission refused to modify the license. Thereafter the bus line proposed that it would accept the royalty provision if a clause was added to the license guaranteeing it a reasonable return on its investment.

The Commission thereupon reopened the case, the royalty provision was amended in accordance with the request of the bus line, the license was issued and the bus line commenced operations under it. When suit was brought to recover the royalties, the bus line contended (1) *that the Commission was without authority to impose the royalty condition*, and (2) that the royalty provision did not permit a reasonable return on its investment. In summarily disposing of the first point, the court said (pp. 891-892):

“The franchise with the proviso added to section 2 was accepted by the bus line, which proceeded to operate under it. It still raises the issue, however, of whether the commission has the authority to impose the payment of annual royalties as a condition of receiving a franchise. Having consented to the imposition of the royalties, if the proviso were added, and operated its bus line since January 1, 1928, under the franchise, it is doubtful whether the bus line is now

in a position to raise this issue. *United Fuel Gas Co. et al. v. R. R. Commission of Kentucky*, 278 U. S. 300, 307, 308, 49 S. Ct. 150, 73 L. Ed. 390; *Wall et al. v. Parrot Silver & Copper Co. et al.*, 244 U. S. 407, 411, 37 S. Ct. 609, 61 L. Ed. 1229."

Again, an analogous situation was presented in the case of *American Bond & Mortgage Co. v. United States*, 52 F. (2d) 318 (C. C. A. 7th), cert. den. 285 U. S. 538. In that case the United States brought suit to enjoin the continued operation of defendant's broadcasting station. Defendant had obtained a license from the Federal Communications Commission, which license contained a general revocation clause. In 1928 the Commission entered an order to the effect that it would hear all applications for renewals of licenses on a certain date. Defendant was notified, along with all other applicants, that, unless a showing was made that the public interest would be served by a renewal of such licenses, they would be denied. Defendant contended that the Radio Act was unconstitutional because it made no provision for compensating defendant for the property which it had constructed and which it had used in its broadcasting activities. The court said (p. 321):

"At the threshold of our consideration of this question, we are met by the fact that, after the passage of the act assailed, appellants, to secure some of the benefits which followed the federal regulation of broadcasting stations, voluntarily made application for a permit to conduct a station and accepted a revocable and limited license with the conditions and limitations clearly set forth. The permit, as well as sections of the statutes referred to therein, is also set forth. Such conditions and time limitations restricted appellants' property rights, as well as its broadcasting privileges. Having sought and secured a government permit or license with its attendant benefits, appellants obviously cannot later assert rights which were surrendered in order to secure the permit. *Rome Ry. & Light Co. v. Floyd County*, 243 U. S. 257, 37 S. Ct. 291, 61 L. Ed. 706."

The authorities cited in the opinions just referred to clearly indicate that the court's decision in each case was predicated upon the principle announced in a long line of Supreme Court cases, some of which were cited by Justice Bailey in his opinion below, to the effect that one who seeks and obtains the benefits or privileges conferred under a statute may not later be heard to contest the validity of such statute. Thus in *Pierce Oil Corporation et al. v. Phoenix Refining Company*, 259 U. S. 125, the Pierce Company, a Virginia corporation, erected a refinery and constructed a pipe line in Oklahoma. At the time it commenced business in Oklahoma the statutes of that State provided that, except as authorized, no corporation should have the right to engage in the business of transporting crude oil through pipe lines and that every corporation engaged in such business should be deemed a common carrier thereof. The Pierce Company made the necessary application for and obtained the privilege of conducting its business operations within the State. Thereafter it refused to transport through its pipe line the oil of the Phoenix Company, at which time a complaint was filed with the Corporation Commission of Oklahoma for an order requiring it to do so. The Pierce Company contended that "to subject it to the duties and responsibilities of a common carrier would result in the taking of its property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." In disposing of this contention, the Supreme Court said (p. 128):

"When the large discretion which the State had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intrastate business is considered (*National Council U. A. M. v. State Council*, 203 U. S. 151, 163; *Pullman Co. v. Kansas*, 216 U. S. 56, 66; *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 83), the contention that this order, of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due

process of law must be pronounced futile to the point almost of being frivolous. 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it (216 U. S. 56, 66), and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the State, is unconstitutional . . .'

"There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. *Pierce v. Somerset Railway*, 171 U. S. 641, 648; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411."

Again, in *United Fuel Gas Company v. Railroad Commission*, 278 U. S. 300, plaintiff sought an injunction restraining the Commission from establishing an alleged confiscatory rate for the sale of natural gas. The record showed that plaintiff had previously held a franchise for the distribution of gas, which expired in 1918. Nevertheless, plaintiff continued its service. In 1920, a State statute subjected all companies similarly situated to the jurisdiction of the Commission, before which the rate proceedings were had. In the injunction proceeding plaintiff contended that the Commission's action under the 1920 statute operated as a renewal of plaintiff's franchise not in conformity with the State constitution. In disposing of this contention the court said (pp. 307-308) :

"But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellants in the present suit. It is the rule of this Court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407; *Electric Co. v. Dow*,

166 U. S. 489; *Eustis v. Bolles*, 150 U. S. 361; *Hurley v. Comm'n of Fisheries*, 257 U. S. 223; *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469. Upon like principle we think that appellants who have procured action by a state commission under a state statute may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state constitution. Cf. *Shepard v. Barron* 194 U. S. 553. The sound discretion which controls the exercise of the extraordinary powers of a federal court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked."

St. Louis Malleable Casting Company v. Prendergast Construction Company, 260 U. S. 469, is another case in point. There the plaintiff sought to have a tax bill declared invalid and cancelled. The bill was issued against plaintiff's property for its proportionate part of the cost of completing a sewer system, to which plaintiff's property was connected. The tax bill was attacked on constitutional grounds. In refusing to pass upon the merits of plaintiff's claim the Supreme Court said (pp. 472-473):

"The evidence leaves no doubt of the fact that plaintiff, during the construction of the district sewer, made application for a license to connect with it, and afterward did connect with it. The only reply that counsel make is that the court meant nothing more by its conclusion and the cases cited 'than the statement of an abstract legal principle' which was 'in no way connected up with the evidence.' It is further said that 'Nowhere in the statement does the Supreme Court find any facts constituting an estoppel.'

"The comment is not justified. Our quotations from the court's opinion establish the contrary, and that the plaintiff did something more than stand by and make no protest; it availed of the benefits of the sewer. The state cases cited are, therefore, not in point.

* * * * *

“However, we are not called upon to resolve the uncertainty, if any there be, in the grounds of the court’s ruling upon the constitutional questions. It is enough for our action that the court considered plaintiff estopped to contest the validity of the sewer or the validity of the tax which was imposed by connecting its premises with the sewer. In that conclusion we concur.”

Also, in *United States v. City and County of San Francisco*, 310 U. S. 16, the City of San Francisco, upon which Congress had conferred certain rights in the public domain upon the condition *inter alia* that it not dispose of or distribute the same through any private corporation or individual, challenged the constitutional validity of such condition after its enjoyment of the grant had commenced. The court said (p. 28-29) :

“*Second.* The prohibitions of § 6 are challenged by the City as an unconstitutional invasion of the rights of the State of California on the ground that they attempt to regulate the manner in which electricity shall be disposed of in San Francisco. And the City therefore insists that these prohibitions must be considered only as covenants in a contract between the City and the United States. Upon this premise, the City has argued here, as it did in the Court of Appeals, that alleged equitable defenses render the covenants unenforceable.

“When the Raker Bill was before Congress, the City filed with the Public Lands Committee of the House a brief and argument in support of the Bill. Citing authorities, including this Court’s opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose ‘the conditions set forth in the Hetch-Hetchy bill.’ After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities, and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to

retain the benefits of the Act while attacking the constitutionality of one of its important conditions.”⁸

To the same effect, see *Hurley v. Commission of Fisheries*, 257 U. S. 223, *United States v. Nudelman*, 104 F. (2d) 549, 552 (C. C. A. 7th); *North Dakota-Montana Wheat Growers' Ass'n. v. United States*, 66 F. (2d) 573 (C. C. A. 8th); *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985 (S. D. Cal.).

Appellant has attempted to overcome the effect of these cases by a hypertechnical analysis of the doctrine of “equitable estoppel” (Appellant’s Br., p. 19, et seq.). Thus, it calls attention to the six “essential elements” of that doctrine as listed by Pomeroy.⁹ It particularly emphasizes two of those elements as “basic” to that doctrine and then “challenges” appellees to bring their case within these principles. The first is that “There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.” The second is that the other party “must in fact act upon it in such manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.”

Assuming *arguendo* that the cases which we have cited are in fact predicated upon any such technical application of the doctrine of “equitable estoppel,” and not, as we think, upon simple waiver,¹⁰ there is no difficulty in meeting appellant’s “challenge” that we find in this record the two

⁸ To this statement the Supreme Court appended the following footnote: “*Cf. Daniels v. Tearney*, 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 29; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411; *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469, 473; *Booth Fisheries v. Industrial Commission*, 271 U. S. 208, 211.”

⁹ “Equity Jurisprudence,” 5th Ed., 1941, vol. 3, sec. 805.

¹⁰ “There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right.” *Pierce Oil Corp. v. Phoenix Refining Co.*, *supra*.

elements thus emphasized by Pomeroy. In the first place, the "conduct" of appellant at the time it voluntarily accepted the condition concealed an apparently hidden determination to contest the Board's authority to impose the condition if and when it should appear desirable to do so. Such a concealment, appraised in the light of circumstances surrounding appellant's admission to the System, amounted to a positive "misrepresentation" that appellant would abide by the terms of the condition, both out of regard for its lawful requirements and as a matter of good faith in fulfilling its voluntary undertaking with the Board.

In the second place, the Federal Reserve System—and therefore the public interest—would suffer a positive detriment if appellant were admitted to System membership at a time when its management appeared to consist of a company the banking policies of which were unsound. Such a detriment, which might in a critical time contaminate a whole section of the banking economy, transcends in magnitude any of those suffered by the parties to the purely private litigation cited by appellant and, we submit, more than satisfies the test announced by Pomeroy.

Along the same lines appellant cites Corpus Juris to the effect that the "Doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do." With this general proposition of law we certainly can have no quarrel. However, and again assuming its applicability here, appellant, in order to avail itself of this principle, must establish that appellees were under a legal duty to admit appellant to System membership in any event. It attempts to do so by the statement, repeated over and over again in its brief, that appellees have "admitted" appellant's qualifications for membership. The basis upon which this assertion is made is as follows: In Paragraph V of its complaint appellant charges that "on or about November 28, 1941, plaintiff, *being in all respects qualified and eligible for membership* in the Federal Reserve System and desir-

ing to become a member thereof, made application," etc. (*Italics ours*) By moving for judgment on the pleadings appellees, of course, admitted all *facts* well pleaded, and it is appellant's position that the above quotation from its complaint is such an allegation of fact.

Merely to state the basis of appellant's position is to disclose how unwarranted is its claim. The allegation of Paragraph V, quoted above, far from constituting a statement of fact, is obviously the grossest kind of a conclusion of law. "The correctness of such a conclusion is not admitted by a motion to dismiss, especially when, as here, its incorrectness is clearly revealed by the very statute from which the conclusion purports to be drawn." *Fletcher v. Jones*, 70 App. D. C. 179, 181, 105 F. (2d) 58, 60. Compare *Lucking v. Delano*, 74 App. D. C. 134, 122 F. (2d) 21, 27; *Putnam v. Ickes*, 64 App. D. C. 339, 78 F. (2d) 223, 226, cert. den. 296 U. S. 612; *Rosenhan v. United States*, 131 F. (2d) 932 (C. C. A. 10th), cert. den. 318 U. S. 790. Furthermore, it is at positive odds with other parts of the record upon which appellant so heavily relies. The record shows that at the time of its application appellant was *not* qualified for membership. In fact, as we have seen, its application at first was denied by the Board. It was only when appellant had conformed to the requirements of the Board's letter of February 20, 1942 that its *conditional* eligibility for membership was established. Moreover, when Congress provided that the Board "may" admit a State bank to membership, it lodged a purely discretionary power in the Board which could not be controlled by this appellant in any event. Cf. *Appel v. Mellon*, 59 App. D. C. 94, 33 F. (2d) 805, 806-808, cert. den. 280 U. S. 585. Hence, appellant is clearly in error in contending that appellees were under a legal duty to admit it to membership regardless of appellant's conduct creating the estoppel.

Appellant also relies upon the case of *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311. In that case it appeared that application had been made to the Interstate Commerce Commission for approval of a plan of re-

organization of the appellee railroad. Part of the proposed plan related to a fund, set apart out of a sum voluntarily contributed by existing stockholders, for the payment of expenses of the reorganization. The Commission approved the plan generally, but conditioned its approval upon a restricted use of the expense fund. A majority of the court, relying upon the now overruled case of *Hammer v. Dagenhart*, 247 U. S. 251, held that neither Congress nor the Commission might validly take action outside the realm of interstate commerce, and that the condition, which had no relation to such commerce, was, therefore, ultra vires the Commission's authority.

The majority opinion in the *St. Paul* case admittedly contains language at odds with the many decisions which we have cited above. But it stands alone among those cases, which were decided both before and after the *St. Paul* case was decided. The lower court appropriately disregarded the case because, as we pointed out above, the main point in controversy was decided on the authority of a case which the Supreme Court has since overruled. Furthermore, the majority opinion in the *St. Paul* case seems never to have attained vigor as a controlling precedent.¹¹ On the contrary, the Supreme Court itself, within the past five years, without expressly overruling the majority opinion, has referred favorably to the strong dissenting opinion rendered by the late Chief Justice Stone (concurred in by Justices Holmes and Brandeis). See *R. F. C. v. Bankers Trust Company*, 318 U. S. 163, 173 (Douglas, J., concurring); *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448, 469; *Group of Investors v. Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 544; *Brown v. Gerdes*, 321 U. S. 178, 181.

¹¹ In recent decisions of the Supreme Court the power of the Interstate Commerce Commission to annex conditions to its orders has been broadly construed. See *United States v. Lowden*, 308 U. S. 225, 238; *Interstate Commerce Commission v. Railway Labor Executives Ass'n.*, 315 U. S. 373, 376. Compare *Atlantic Coast Line v. United States*, 48 F. (2d) 239, 244 (D. C. S. C.); *New York Central Securities Corporation v. United States*, 54 F. (2d) 122, 128-129; *National Broadcasting Co. v. United States*, 319 U. S. 190; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591.

We think a few sentences from Justice Stone's dissent in the *St. Paul* case are apposite to the case at bar. He said:

"So far as appears, not until appellee filed the present petition did it disclose any purpose to disregard the condition upon which the order depended. In the meantime it had taken full advantage of the benefits of the order.

* * * * *

"Only after the reorganization had thus become an accomplished fact by appellee taking the benefit of so much of the order as suited its purposes, did it elect to repudiate the condition upon which the order was founded . . .

"If appellee were unable or unwilling to comply with the order as made, equity and good conscience required, at least, either disclosure of that fact to the district court before securing the transfer of the railroad property to it; application, upon full statement of the facts, to the commission to exercise the jurisdiction, which it had reserved, to approve a modified plan; or prompt initiation of the present proceedings to test the validity of the order before a situation had been created prejudicial to the public interest and to the commission's performance of its duties. Instead, appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of its real purpose, it asks relief from the condition only after it had enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee. See *Davis v. Wakelee*, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578."

Appellant itself has recognized the compelling force of the language above quoted. In fact, it quotes a portion of

that language in its own brief and attempts to justify its conduct in the light of such quotation. At page 28 of its brief appellant emphasizes that portion of the above statement wherein Justice Stone pointed out that "equity and good conscience required . . . prompt initiation of the present proceedings . . . before a situation had been created prejudicial to the public interest and to the Commission's performance of its duties." To show that its own conduct meets this test appellant asserts that it "promptly" brought suit to test the validity of Condition No. 4 when it learned that a "situation had been created by these defendants, whereby compliance by it with the invalid condition would have a ruinous effect upon its business, *because of a non-insurance commitment previously unknown to it but known to the defendants,*" etc. (Italics ours) This allegation is amplified a few pages later under Point III of appellant's brief (p. 32 et seq.) wherein it is charged that appellees and the Federal Deposit Insurance Corporation have entered into a "secret agreement" which would have the effect of "depriving the plaintiff permanently not merely of its Federal Reserve membership but also of its federal deposit insurance in the event that Condition No. 4 should ever be enforced." The so-called "secret agreement" is elsewhere described in appellant's brief as a "secret plan" (p. 17) of a "conspiratorial character" (p. 14), arrived at in a "secret meeting" (p. 12), and growing out of an "official dislike for Transamerica Corporation" (p. 14).

By the use of such shocking and wholly unfounded accusations appellant is merely attempting that which it was unsuccessful in accomplishing below, namely, to draw into issue in this case the completely irrelevant disputes of Transamerica Corporation and its affiliated banking institutions with the bank supervisory agencies of the federal government. As the Court will see when it examines the affidavits filed in support of appellant's motion for summary judgment, Transamerica has contributed to these proceedings a number of letters passing between itself and the Board concerning one of those disputes. It is upon the basis of

these letters that appellant has predicated its fantastic charge of "conspiracy." As the Court will also see, however, not one of those letters contains even the remotest reference to appellant, much less any indication of an alleged "policy" of the banking agencies with respect to it.

Specifically, those letters concerned the Board's refusal to approve an application of the First Trust & Savings Bank of Pasadena, California, a State member bank in the Transamerica banking empire, to establish branches at Temple City and Alhambra, California (App. 69-70, 72-73). Transamerica was informed by the Board that its decision to deny the application of the Pasadena Bank was "in accord with the policy, upon which there is unanimous agreement by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the federal bank supervisory agencies should, under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group." The reason why such "policy" was determined upon may be gleaned from the Board's statement in a subsequent letter (App. 82-85) wherein it stated:

"It is our understanding that the position of the Comptroller of the Currency in this matter, referred to above, remains the same. We are advised that the Federal Deposit Insurance Corporation has indicated its unwillingness under existing circumstances to insure any newly organized State nonmember bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System. As for the Board's position, until it is satisfied that the financial policies pursued by Transamerica Corporation and its affiliated institutions are consistent with the public interest, it will consider as unsound their efforts to continue an expansion program by whatever means, including the organization of new State banks, the acquisition of control of existing State banks, or the conversion of national banks to State banks, and the establishment of branches thereof."

The fact that the three banking agencies have a legitimate interest in evolving a central "policy" respecting their decisions concerning Transamerica and its affiliated banks may be partly explained by the following tabulation appearing in the Congressional Record (Vol. 90, part 10, 78th Cong., 2d sess., p. A3018), which gives some indication of the size and extent of the Transamerica banking empire, and the number of banks and branches within that organization with which these agencies must deal in their respective supervisory capacities.

BANKS AND BRANCHES IN THE TRANSAMERICA CORPORATION GROUP COMPARED WITH ALL BANKS AND BRANCHES IN THE SAME STATES, DEC. 31, 1943.

[Amounts in thousands of dollars]

	Banks	Branches	Banks and branches	Deposits of banks and branches ¹²
Transamerica Corporation banks: ¹³				
Arizona	2	3	5	53,082
California	12	495	507	3,660,629
Nevada	4	10	14	80,081
Oregon	9	39	48	370,436
Washington	1	8	9	71,233
Total	28	555	583	4,235,461
All banks in same States:				
Arizona	12	26	38	229,204
California	208	827	1,035	8,859,654
Nevada	10	13	23	99,098
Oregon	72	68	140	909,136
Washington	131	88	219	1,579,366
Total	433	1,022	1,455	11,676,458
Ratio (percent) of Transamerica banks to all banks in same States:				
Arizona	16.7	11.5	13.2	23.2
California	5.8	59.9	49.0	41.3
Nevada	40.0	76.9	60.9	80.8
Oregon	12.5	57.4	34.3	40.7
Washington	.8	9.1	4.1	4.5
Total	6.5	54.3	40.1	36.3

¹² Separate deposit figures for branches are not available.

¹³ Includes Bank of America, N. T. & S. A., San Francisco, and National Bank of Washington, Seattle, which are not included in the "26 Transamerica-owned banks" shown in the Transamerica Corporation 1943 annual report but are shown there as "Banks in which Transamerica Corporation and its subsidiaries have substantial minority interests."

NOTE.—The number of branches shown above does not include banking facilities at military reservations provided through arrangements made by the Treasury Department with banks designated as depositaries and financial agents of the Government.

In the light of this revealing table it would be unusual, to say the least, if the federal banking agencies did *not* have a "policy" respecting decisions on fundamental questions involving Transamerica controlled banks. The extensive liability of the Federal Government under the insurance provisions of the law is alone sufficient, so far as the Transamerica empire is concerned, to justify such a "policy." In addition, of course, there is the fact that the national banks in the Transamerica group are under the supervision of the Comptroller; before branches of national banks may be established the Comptroller's "approval" must be obtained.¹⁴ State member banks in the group are under the supervision of the Board; before branches of such banks may be established the "approval" of the Board must be obtained.¹⁵ And nonmember insured banks are under the supervision of the Federal Deposit Insurance Corporation; before branches of such banks may be established the "written consent" of that Corporation must be obtained. With so many different kinds of banks under one management it would be ridiculous to suggest that each of the banking agencies should operate independently of each other in respect to applications for branches by any of the Transamerica controlled banks or, indeed, with respect to any decisions relating to such banks which affect the common responsibility of all such agencies to keep the banking economy of our country in a sound and healthy condition.

But these considerations, as appellant intended that they should do, have taken us far afield. However, they do conclusively demonstrate the total lack of substance in appellant's charge of "conspiracy"; they show that appellant has attempted to convert the Board's official letters denying permission of one bank in the Transamerica group to establish a branch into a "conspiracy" to deny deposit insurance to appellant—an entirely different subject concerning an

¹⁴ R. S. 5155, 12 U. S. C. § 36.

¹⁵ 48 Stat. 164, ch. 89, 12 U. S. C. § 321.

entirely different bank. We submit that such an abortive attempt to confuse the issues does not, as appellant contends, either explain or vindicate its conduct in the light of the statement by Justice Stone cited above.

The other cases cited by appellant are not in point. In *Utah Power & Light Co. v. United States*, 243 U. S. 389, the only question before the court for decision was whether defendants might continue to use public lands for purely private purposes without obtaining a license to do so as required by law. The court ruled against the defendants and in doing so refused to pass upon certain challenged administrative regulations until defendants had applied for a license and were brought into direct contact with such regulations. In other words, the court in effect held that defendants could not challenge such regulations until a justiciable controversy concerning them had arisen.

Appellant's other cases deal with situations in which a State, in admitting a foreign corporation to do business within that State, sought to impose conditions upon such admittance which were clearly repugnant on their face to the public policy of the United States. We might concede that if Condition No. 4 appeared on its face to be contrary to established public policy, neither party would be estopped from challenging its validity. Thus a condition depriving a person of a right to vote or to marry or to resort to the courts would come under the rule laid down by such cases. That is not the situation presented by this record; in the words of the lower court, there is "nothing contrary to public policy in the condition agreed upon by the parties."

We submit that appellant is estopped to challenge the validity of Condition No. 4.

III.

THE CONDITION IS VALID.

Should the Court conclude that a justiciable controversy is presented by this record and that appellant is not legally estopped from bringing its present action, there is no diffi-

culty in demonstrating the complete validity of Condition No. 4. Before commencing this phase of our discussion, however, let us first set out the pertinent statutory provisions dealing with System membership. Section 9 of the Federal Reserve Act provides that a State bank

“desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located.” (44 Stat. 1229, c. 191, U. S. C., Title 12, § 321)

In acting upon such application the Board is required to consider

“the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this act.” (40 Stat. 233, c. 32, U. S. C., Title 12, § 322)

As membership in the System automatically entitles a bank to federal deposit insurance coverage, the Board, in the event an applying bank is noninsured, is required to certify to the Federal Deposit Insurance Corporation that it has considered

“The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section.” (48 Stat. 168, c. 89, U. S. C., Title 12, § 264(e)(2); 48 Stat. 969, c. 546, U. S. C., Title 12, § 264(g))

Finally, in admitting a bank to membership the Board specifically is authorized to impose conditions of membership. The Act provides:

"The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank." (44 Stat. 1229, c. 191, U. S. C., Title 12, § 321)

In the light of this statutory setting it is apparent at once that Congress has specifically authorized the imposition of membership conditions by the Board. And when that fact is contrasted with the totally deficient allegations of the complaint, the presumption of validity which attends the administrative exercise of a power expressly conferred by statute is alone sufficient, we submit, to support Condition No. 4. "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 6. See also *Proctor & Gamble v. Coe*, 68 App. D. C. 246, 96 F. (2d) 518, 521, cert. den. 305 U. S. 604; *Dunn v. Ickes*, 72 App. D. C. 325, 115 F. (2d) 36, 37, cert. den. 311 U. S. 698; *Klamath Indians, et al. v. United States*, 296 U. S. 244, 253. In applying this principle the courts have even gone so far as to indicate that where, as here, no direct statutory right of review of such official action is provided, the presumption of validity is probably conclusive so far as the exercise of a validly conferred power is concerned. Cf. *Twin City Milk Producers Association v. McNutt*, 122 F. (2d) 564, 566 (C. C. A. 8th).

This Court has held that a plaintiff cannot overcome the presumption of validity by the mere bald assertion of invalidity, unsupported by any facts justifying such an allegation. Cf. *Lucking v. Delano*, 74 App. D. C. 134, 122 F. (2d) 21. Yet that is what appellant has attempted here. The complaint can be searched in vain for any allegation of fact to support appellant's use of such terms as "arbitrary," "unreasonable," "capricious," "discriminatory," and "ultra vires" in characterizing Condition No. 4 (Com-

plaint, Par. IX; App. 5). Such words are of course mere conclusions; they do not supply the Court with any facts with which to appraise the worth, or the lack of it, of appellant's charge. Under these circumstances, the language of this Court in *Lucking v. Delano*, supra, is apposite: "Especially in view of the presumption of proper performance of duty by public officials, no showing was made by the pleadings in this case sufficient to require consideration by a court of equity." See also *Putnam v. Ickes*, supra, and *N. L. R. B. v. Montgomery Ward & Co.*, 79 App. D. C. 200, 144 F. (2d) 528, 530, cert. den. 323 U. S. 774. Compare the language of the Supreme Court in *Isbrandtsen & Moller Co. v. United States*, 300 U. S. 139, 145.

Apart from the presumption of validity which supports the Condition, however, it is clear from the language of the statute that, in passing upon applications for System membership and in determining what conditions, if any, shall be required in connection with the admission of State banks, the Board acts in the exercise of a purely discretionary function. In so acting the Board not only must take into account the broad national objectives of the Federal Reserve Act¹⁶ but also, as we have seen, it must consider such purely local and wholly intangible factors as "character of management," "financial history and condition," "adequacy of capital structure," "future earnings prospects," etc. Obviously, it was never intended by Congress that resort to the courts could be had in all instances to review the Board's appraisal of such imponderables. Here, as in other governmental schemes involving highly technical subjects, Congress created an administrative board and provided it with the necessary mechanical and investigative authority to deal with the subject on an expert and definitive basis.

¹⁶ The preamble to the Act states as follows:

"An act to provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes." (38 Stat. 251, c. 6)

The rule is clear, of course, that the courts will not substitute their judgment for that of an administrative agency in a matter that is within the discretionary authority of such agency. "Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." *Gray v. Powell*, 314 U. S. 401, 412. See also *Ickes v. Underwood*, 78 App. D. C. 396, 141 F. (2d) 546; *Tidal Osage Oil Co. v. West*, 58 App. D. C. 737, 30 F. (2d) 737; *Obrien v. Lane*, 40 App. D. C. 493; *Perry v. Work*, 56 App. D. C. 92, 10 F. (2d) 887, cert. den. 271 U. S. 668. This Court has had occasion to apply this very principle to a decision of the Board in a matter very similar to that here presented. Thus, in *Apfel v. Mellon, et al.*, 59 App. D. C. 94, 33 F. (2d) 805, cert. den. 280 U. S. 585, plaintiffs sued to compel the members of the Board to issue a permit to plaintiffs to engage in foreign banking activities. Under the provisions of Section 25(a) of the Federal Reserve Act,¹⁷ five or more persons may file with the Board articles of association for the purpose of engaging in the business of foreign banking and, "after the Board of Governors of the Federal Reserve System has approved the same and issued a permit to begin business," the association becomes a body corporate with certain statutory powers. Plaintiffs had duly filed their articles of association with the Board, but the latter declined to approve the same, being of the opinion that the plaintiffs lacked the financial responsibility, experience, training, and other qualifications necessary for such a venture. The lower court dismissed the complaint, which prayed for the issuance of a writ of mandamus. This Court affirmed, saying in part as follows:

"It is contended by appellees that the statute imposes the duty upon the Federal Reserve Board of exercising its judgment and discretion with respect to the approval or disapproval of the articles of association and organization certificates made and filed under the act, and that the Board's action in this instance is

¹⁷ 41 Stat. 378, 379, c. 18, U. S. C., Title 12, §§ 611, 614.

within the limits of that authority. On the other hand, appellants contend that 'Congress has not undertaken to delegate to the Board the discretion it has assumed to exercise.'

"We agree with the contention of the appellees. The statute provides that an association formed under the act shall not become a body corporate until after the articles of association and organization certificate have been duly made and filed, and after the Federal Reserve Board has approved the same and issued a permit to it to begin business. The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.

* * * * *

"In the instant case it is clear that Congress was providing a means for conferring special and important privileges upon such corporations as should be organized under the Edge Act. An abuse by any corporation of the powers thus granted to it might involve grave consequences to our public service. It is reasonable to believe that Congress intended that a careful investigation should be made by the Federal Reserve Board concerning the character and competency of the incorporators of such an enterprise, as one of the means of determining whether to grant or withhold their approval of the application for incorporation. Moreover, it should be noted that the act repeatedly provides for an 'approval' by the Board as a prerequisite to proceedings authorized thereunder, and in all such instances the term plainly implies the exercise of consideration, judgment, and discretion by the Board."

The rule announced in the *Apfel* case is in harmony with numerous other decisions interpreting the federal banking statutes which hold that the functions of the bank supervisory agencies are entirely discretionary in their nature and, except upon a charge of fraud, may not be made the subject of judicial review. Thus, the Supreme Court in *Bushnell v. Leland*, 164 U. S. 684, held conclusive the certificate of the Comptroller of the Currency as to the

organization of a national bank and refused to look behind his official determination. In *Raichle v. Federal Reserve Bank*, 34 F. (2d) 910 (C. C. A. 2nd), it was held that the courts were without power to review the action of the Board in changing the rediscount rates, the complaint having alleged that such action was ordered for the purpose of raising interest rates and to restrict the general supply of credit. In *Bailey v. Tillinghast*, 99 Fed. 801 (C. C. A. 6th), the court refused to review the sufficiency of the Comptroller's certificate authorizing an increase in the bank's capital stock. And in the comparatively recent case of *Adams v. Nagle*, 303 U. S. 532, the Supreme Court had under consideration the extent to which, if any, the Comptroller's action in ordering assessments under the double liability provisions of the National Bank Act, against stockholders of closed banks, may be reviewed by the courts. The Court held that, absent a charge of fraud, it would not review the Comptroller's action for alleged error either of fact or law. It said:

"The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no application for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; *but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion.* Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority." (Italics ours)

See also *Wannamaker v. Edisto National Bank of Orangeburg*, 62 F. (2d) 696 (C. C. A., 4th); *Washington National Bank of Tacoma v. Eckels*, 57 Fed. 870 (C. C., Wash.); *Liberty National Bank v. McIntosh*, 16 F. (2d) 906 (C. C. A., 4th); *Kennedy v. Gibson*, 8 Wall. 498; *National Bank v. Case*, 99 U. S. 628; *United States Savings Bank v. Morganthau*, 66 App. D. C. 234, 85 F. (2d) 811, cert. den. 299 U. S. 605, rehearing den. 301 U. S. 666; *Harper v. Moran*, 64 App. D. C. 210, 76 F. (2d) 980, cert. den. 296 U. S. 592.

The authorities just cited are clearly applicable here. Certainly the Board would have been acting within the permissible range of its discretionary authority had it denied appellant membership *in limine* because it found appellant's "management" unsound, or because its "future earnings prospects" were not sufficiently good, or for any other reason which bore legitimately upon appellant's proposed relationship to the System. It must therefore follow, we submit, that where, as here, the Board has reason to believe that an applicant's "management" might come under the control of a company, the banking policies of which it felt to be unsound, the same discretionary authority existed to condition membership against such an event.

Furthermore, as we have seen, the opinion which the Board entertained concerning the Transamerica banking policies was concurred in by the Comptroller of the Currency and the Federal Deposit Insurance Corporation. This is important not only because the judgment of these banking agencies give valid and expert support to the Board's opinion, but also because it emphasizes another facet of the Board's responsibility in passing upon appellant's application. As pointed out above, the Board, by admitting a noninsured bank to membership, automatically grants it federal deposit insurance coverage. And if the Federal Deposit Insurance Corporation, the agency primarily charged with the administration of this phase of the federal banking scheme, itself had determined that

Transamerica's bank expansion program was unsound from the standpoint of further extending the insurance liability of the United States to that group of affiliated banks, then it seems clear that such determination was entitled to the highest respect by the Board. Under such circumstances it can hardly be contended that Condition No. 4 "is so unrelated to the tasks entrusted by Congress to the [Board] as in effect to deny a sensible exercise of judgment." *Gray v. Powell*, supra.

Appellant's brief seeks to torture the language of Section 9 into restrictive rather than discretionary implications. It argues that, when Congress authorized the Board to prescribe conditions of membership "pursuant" to the Act, it intended to permit only those conditions which are specifically authorized by some other section of the Act. In other words, appellant contends that all conditions of membership must have direct statutory sanction.

Such an argument is clearly untenable. In the first place, it is in direct conflict with the many judicial decisions above referred to, which hold that the federal banking statutes generally vest broad discretionary powers in the supervisory agencies. It is irrational to suggest that, solely with respect to one section of the banking laws, Congress visualized in advance all of the situations which might arise to require particularized administrative attention and enacted specific statutory provisions to deal with such situations. "In the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." *Phelps Dodge Corporation v. N. L. R. B.*, 313 U. S. 177, 194.

In the second place, appellant's argument also conflicts with the Supreme Court's interpretation of the words "pursuant to" as contained in a statutory context similar to that presented here. In *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 301 U. S. 379, the Su-

preme Court interpreted Section 162 of the Revenue Act of 1928,¹⁹ which allowed as current income deductions any part of gross income "which pursuant to terms of . . . the trust" was used for charitable purposes. The question before the Court was whether the charitable donations of a trustee, although not *specifically required* by the trust, were made "pursuant to" the trust. The Court said:

"We are asked to hold that the words 'pursuant to' mean directed or definitely enjoined. And this notwithstanding the admission that Congress intended to encourage charitable contributions by relieving them from taxation. *Lederer v. Stockton*, 260 U. S. 3; *United States v. Provident Trust Co.*, 291 U. S. 272, 285.

" 'Pursuant to' is defined as 'acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.'"

"The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary. We find nothing in the regulations or practice of the Treasury Department *or in the general purpose of the statute* which requires the narrow meaning advocated by respondent." (Italics ours)

Appellant attempts to justify its restrictive interpretation of the words "pursuant thereto" by reviewing a portion of the legislative history of the Act of February 25, 1927,²⁰ in which those words were added as an amendment to Section 9 of the Federal Reserve Act.

The 1927 Act is popularly known as the "McFadden Act," it having been introduced by Congressman McFadden, who was then Chairman of the House Committee on Banking and Currency. Consequently, the statements of Congressman McFadden regarding the legislative history of the bill may be regarded as authoritative. They show that the language in question originated in an effort by

¹⁹ 44 Stat. 838, c. 852.

²⁰ 44 Stat. 1229, c. 191, U. S. C., Title 12, § 321.

a representative of the National Association of Supervisors of State Banks to have a provision inserted in the bill which would guarantee to State banks becoming members of the Federal Reserve System the enjoyment of all of the powers which they had enjoyed under State law, unhampered by any conditions or restrictions imposed by the Federal Reserve Board. The amendment as thus proposed reads as follows:

“The Federal Reserve Board, subject to the provisions of this act and to such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a stockholder of such Federal reserve bank: Provided, however, That such conditions or rules or regulations prescribed shall not limit or impair the charter or statutory rights and powers of such banks nor shall the Federal Reserve Board impose any conditions or restrictions other than those under which national banks shall operate.” (Cong. Rec., vol. 67, part 3, p. 3249)

The Committee rejected this amendment, but it was again offered on the floor of the House when the bill was being debated. At that time Congressman McFadden, in opposing the amendment, made the following short statement:

“Mr. Chairman, I think there is a little time remaining, and I want to say to the Members of the House that this is a proposition which the Federal Reserve Board very strenuously oppose. *It would take all discretionary power away from the Federal Reserve Board*, and in my opinion the amendment should not be adopted.” (Italics ours) Id.

Following the statement by Congressman McFadden the House rejected the proposed amendment. (Cong. Rec., vol. 67, part 3, p. 3249)

Thereafter Congressman McFadden appeared before the Senate Banking and Currency Committee and made the following statement concerning the amendment:

"Since this bill has been before Congress there has been a persistent attempt by Mr. Sims, vice president of the Hibernia Trust & Savings Bank, of New Orleans, and also secretary of the National Association of Supervisors of State Banks, to insert an amendment which would deprive the Federal Reserve Board of all discretionary authority to impose any condition of membership upon State banks which would in any way limit the exercise of their charter powers. In other words, if a State bank under the State laws possessed the charter powers to engage in the insurance business, or the warehouse business, the public utility business, or the automobile business, the board would have to permit them as Federal reserve members to continue to carry on these enterprises, although they can not be said to constitute the banking business. As chairman of the House committee, I had a conference with Mr. Sims and two of his associates and arranged for a special hearing before the Federal Reserve Board. In the meantime there was inserted in the bill an amendment appearing as a new section 10, designed to meet this situation. This language, however, proved to be unsatisfactory to Mr. Sims. Upon consideration of the bill in committee, this section was stricken out by a committee amendment, and the House sustained the committee and declined to approve the language desired by Mr. Sims. In the meantime, on February 2, 1926, I received a letter from the Federal Reserve Board, in which they set forth at length their views in opposition to the so-called Sims amendment, a copy of this letter I herewith submit as a part of my remarks." (Hearings, Senate Banking and Currency Committee, 69th Cong., 1st sess., on S. 1782 and H. R. 2, p. 20)

The Sims amendment did not appear in any of the forms of the bill considered by the Senate. The bill as reported contains only the language which now constitutes the last sentence of paragraph 1 of Section 9 of the Act, and this language was finally adopted by both Houses.

We submit that, in the light of this legislative history, there is no basis for any such extreme view as that suggested by appellant. While it is true that Congress did not intend, nor could it authorize, the Board to prescribe any

kind of condition that it pleased, neither did it intend to limit the Board in imposing conditions solely to paraphrasing other sections of the statute. That this is so is particularly evidenced by the language of Congressman McFadden above quoted wherein he opposed the Sims amendment because "it would take all discretionary power away from the Federal Reserve Board."

Even if appellant's interpretation of Section 9 be correct, however, there is still a decisive answer to it here. It is of course obvious that the member banks constitute the very blood stream of the Federal Reserve System. If they are sound, virile institutions, then the over-all banking structure of which they are a part will also be strong and healthy and capable of producing maximum results in the public interest. On the other hand, if even one of them is weak and unhealthy, then it drains the strength of the others; in time of great crisis it might even bring about complete paralysis.

Recognizing this fact Congress specifically enjoined the Board to consider, *inter alia*, "management" and "financial condition" in passing upon membership applications. Admittedly, therefore, the Board could require, as a condition of membership, that the bank change its management or financial condition *before* it is admitted to the System. But this power would be a futile one if on the very day after its admittance the bank could restore its previous management or impair its financial condition. Consequently, the power to require a change in management or financial condition before a bank is admitted to the System, to be effective, must also include the power to *preserve* the effects of such a change. We submit, therefore, that Condition No. 4 has even that direct statutory sanction which would be required under the strictest application of appellant's argument.

Appellant's other arguments are equally untenable. Indeed, most of them flow from the entirely false premise that, in imposing Condition No. 4, the Board was merely at-

tempting to control the size of Transamerica Corporation. Numerous statutory provisions are cited to show that bank holding companies are legal and that they may own stocks of banks which are members of the Federal Reserve System. Reference is made to certain testimony by Board officials before Congress to the effect that the Board lacks effective powers under existing statutes to prevent predatory and monopolistic practices from developing in the bank holding company field. From these and other similar and admitted facts appellant concludes that appellees have "admitted officially that they had no right to impose a restriction such as Condition No. 4." (Appellant's Br., p. 34).

Here again, however, appellant has attempted to draw upon a totally unrelated subject matter to support its conclusion. One facet of the Board's jurisdiction lies in the administration of Section 5144 of the Revised Statutes, as amended.²¹ That section, which is set out in the appendix to this brief, deals with bank holding company affiliates and constitutes the only Congressional attempt thus far to deal directly with such organizations. Without analyzing the section in detail, it provides generally that all companies which come within the definition of a holding company affiliate must secure a permit from the Board before they may vote the stock which they own in national or member banks.²² Certain statutory conditions are prescribed covering examinations, reserves, criminal liability, etc. Nowhere in that section, however, did Congress place any restrictions upon the expansion of such organizations. In its Annual Report to Congress for 1943 the Board recommended that Congress amend the law in this respect, and such a bill was introduced at the request of the Board on March 26, 1945 (S. 792, 79th Cong., 1st sess.: H. R. 2776, 79th Cong., 1st sess.). More recently a substituted bill

²¹ 48 Stat. 186, c. 89, 49 Stat. 710, c. 614, U. S. C., Title 12, § 61.

²² While State member banks are not mentioned in Section 5144, they are required to secure an agreement from their holding company affiliates that the latter will be subject to the same conditions and limitations as prescribed in that section. 48 Stat. 166, c. 89, U. S. C., Title 12, § 337.

for the original version was introduced in the House of Representatives (H. R. 6225, 79th Cong., 2nd sess.).

The facts recited by appellant all have reference solely to this limited phase of the Board's statutory responsibilities and have no relation whatever to its function of passing upon the eligibility of State banks for System membership. Obviously, the two problems are totally unrelated. So far as the expansion of bank holding companies generally is concerned, the problem is one of national policy not yet declared by Congress. The Board has expressed itself as fearful lest the continued and unfettered expansion of such companies accomplish the ultimate destruction of the independent banking system of the nation.²³ In passing upon the "character of management" of an applying bank, however, the Board legitimately is concerned with eliminating all, whether holding company or individual, who might offer potential dangers either to the bank itself or to the System. Under appellant's argument the Board would be required to permit any bank holding company, no matter how unsound its policies, to participate in the *management* of a member bank, simply because no authority was conferred upon the Board by Section 5144 to limit the *size* of such companies. Such a contention is clearly repugnant to the spirit as well as the letter of the Federal Reserve Act.

Next, appellant argues that the Condition is inconsistent with the provisions of Paragraph 12 of Section 9 of the Act²⁴ which provides, *inter alia*, that a bank becoming a member of the System "shall retain its full charter and statutory rights." Appellant argues that placing any limitation upon the ownership of its shares is a violation of this section.

The complete answer to this argument is contained in the first seven words of the provision quoted by the appellant.

²³ Under Section 6(d) of H. R. 6225 the Board has recommended that Congress limit the future expansion of bank holding companies to those situations where, *inter alia*, it would be consistent with "the national policy against restraint of trade and undue concentration of economic power and in favor of the maintenance of competition in the field of banking."

²⁴ 40 Stat. 234, c. 32, 42 Stat. 821, c. 274, U. S. C., Title 12, § 330.

It reads: "*Subject to the provisions of this Act,*" etc., the bank shall "retain its full charter and statutory rights." (Italics ours) A condition imposed pursuant to the power conferred upon the Board by Section 9 is, of course, a "provision of this Act" to which a member bank is "subject."

Appellant also argues that the Condition is inconsistent with the provisions of Paragraph 9 of Section 9 of the Act.²⁵ That section allows a bank to "withdraw" voluntarily from System membership. Appellant argues that Condition No. 4 makes the "voluntary" right to withdraw a "compulsory" duty to withdraw. But no better example of a "voluntary" undertaking could be found, we submit, than that evidenced by the action of the appellant, as well as all of its stockholders and directors, in their agreements with the Board made in 1942 for the purpose of securing appellant's admission to the System. As stated by the lower court, "The claim that this agreement was brought about by duress of the plaintiff is, I think, without foundation."

Next, appellant argues that the contention is inconsistent with Section 12B(y) of the Act.²⁶ That section, which relates exclusively to the deposit insurance provisions of the law, provides as follows:

"It is not the purpose of this section to discriminate, in any manner, against State non-member, and in favor of national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section."

Upon the basis of this quotation appellant makes the novel argument that, as no power is conferred upon the Federal Deposit Insurance Corporation to annex conditions in granting insurance coverage, it is being discriminated against in being made subject to Condition No. 4 by the Board. The answer to this contention is twofold. In the first place, appellant did not apply to the Federal Deposit Insurance Corporation for insurance; it applied to

²⁵ 40 Stat. 233, c. 32, 46 Stat. 170, c. 175, U. S. C., Title 12, § 328.

²⁶ 49 Stat. 703, c. 614; 53 Stat. 842, c. 214; U. S. C., Title 12, § 264(y).

the Board for admission to the Federal Reserve System and the Board has specific statutory power to impose conditions on member banks. In the second place, appellant's contention, if upheld, would have the effect of amending Section 9, by construction, so as to prevent the Board from imposing conditions of membership upon any applicant which is not an insured bank—a construction which would be directly contrary to the plain wording of the statute.

Again, appellant refers to Paragraph 8 of Section 4 of the Act ²⁷ which provides, in substance, that the affairs of the Federal Reserve *banks* shall be administered “without discrimination in favor of or against any member bank or banks.” Of course, the Federal Reserve *banks* had nothing whatever to do with the imposition of Condition No. 4, nor can they take any action pursuant to the Condition. That matter rests solely in the Board's discretion. A further answer to the contention is that the section quoted by appellant is contained in that part of the Act which creates the Federal Reserve Banks and defines the duties of their directors, the majority of whom are selected by the member banks themselves. The provision referred to obviously was intended to guard against mere favoritism on the part of such directors.

Next, appellant argues that the Condition is unreasonable. This argument is expanded to paint the alleged dire results which will flow if the Condition is upheld. But the latter are, of course, beside the point; for if the Condition is valid, the effects, if any, which may flow therefrom, even if so grave as that alleged by appellant's counsel, are nevertheless *damnum absque injuria*. However, appellant's argument of unreasonableness seems to be predicated upon its alleged inability to control its stockholders in the disposition of their bank shares. The complete answer to this contention is that appellant with perfect validity could have controlled its shareholders to the extent necessary to protect it against violation of the Condition, and this by

²⁷ 48 Stat. 163, c. 89, U. S. C., Title 12, § 301.

the simple expedient of a by-law limiting disposition of its shares to meet the requirement of Condition No. 4. It is sufficient on this point merely to refer to 8 Fletcher Cyclopedia Corporations (Perm. Ed. 1931), Section 4205, pp. 784, 787 which points out that by-laws designed to protect the corporation and its interests by partially restricting the transfer of the corporation's stock "as by limiting the persons to whom it might be transferred" may be validly enacted by a corporation; "the weight of authority seems to be that such restrictive by-laws are proper and not necessarily objectionable per se, but are consistent with common sense and practical business, especially in the case of corporations of special nature or purposes or those in which the stock carries some special stockholder's liability." *Id.*

Next, appellant attempts to inject a constitutional argument into the case. It urges that Congress itself would have no power to prescribe Condition No. 4 by direct legislation because it could not "pick out one bank and say to that bank alone that it shall not be admitted nor retained as a member if any of its stock is held by a holding company." Consequently, it argues, Congress could not delegate to the Board the authority to impose such an alleged discriminatory condition.

It is sufficient in answer to this argument to point out that what Congress has done under Section 9 is merely to delegate to the Board the power to make detailed determinations in applying a legislative policy to particular facts and circumstances. In this case the Board determined, pursuant to that power, that if a *particular* holding company should acquire appellant's stock, an unsound situation might result which would be detrimental to the banking system under the Board's supervision. As the Supreme Court said in *Yakus v. United States*, 321 U. S. 414, 424:

"The Constitution as a continuously operated charter of Government does not demand the impossible or

the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct * * *. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework."

Finally, appellant argues that the Court should not have dismissed the case as to the defendant McKee, whose term of office on the Board expired after appellant's complaint was filed. We think it sufficient in answer to appellant's argument on this matter to refer the Court to its decision in *Bank of America N. T. & S. A. v. Douglas*, 76 App. D. C. 373, 132 F. (2d) 9, involving an identical situation.

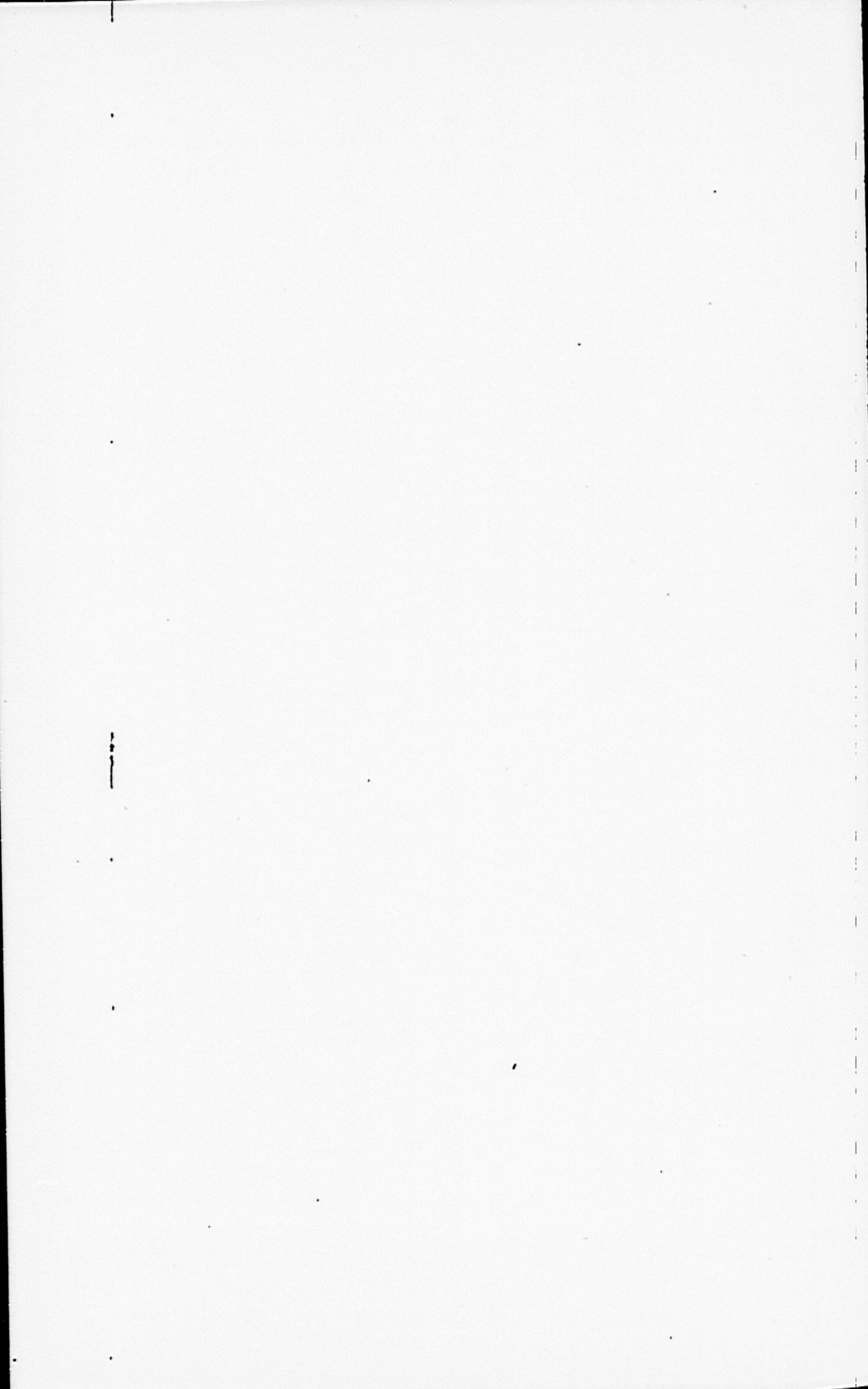
CONCLUSION.

On the basis of the arguments hereinabove set forth the judgment of the lower court should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX.

Section 5144, Revised Statutes.

“In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that (1) this shall not be construed as limiting the voting rights of holders of preferred stock under the terms and provisions of articles of association, or amendments thereto, adopted pursuant to the provisions of section 302(a) of the Emergency Banking and Bank Conservation Act, approved March 9, 1933, as amended, (2) in the election of directors, shares of its own stock held by a national bank as sole trustee, whether registered in its own name as such trustee or in the name of its nominee, shall not be voted by the registered owner unless under the terms of the trust the manner in which such shares shall be voted may be determined by a donor or beneficiary of the trust and unless such donor or beneficiary actually directs how such shares shall be voted, (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee, and (4) shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first obtained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association. Share-

holders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such bank shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee, such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares.

“For the purpose of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

“Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its shareholders so to vote the same. The Board of Governors of the Federal Reserve System may, in its discretion, grant or withhold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its management, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted except upon the following conditions:

“(a) Every such holding company affiliate shall, in making the application for such permit, agree (1) to receive, on dates identical with those fixed for the examination of banks with which it is affiliated, examiners duly authorized to examine such banks, who shall make such examinations of such holding company affiliate as shall be necessary to disclose fully the relations between such banks and such holding company affiliate and the effect of such relations upon the affairs of such banks, such examinations

to be at the expense of the holding company affiliate so examined; (2) that the reports of such examiners shall contain such information as shall be necessary to disclose fully the relations between such affiliate and such banks and the effect of such relations upon the affairs of such banks; (3) that such examiners may examine each bank owned or controlled by the holding company affiliate, both individually and in conjunction with other banks owned or controlled by such holding company affiliate; and (4) that publication of individual or consolidated statements of condition of such banks may be required;

“(b) After five years after the enactment of the Banking Act of 1933, every such holding company affiliate (1) shall possess, and shall continue to possess during the life of such permit, free and clear of any lien, pledge, or hypothecation of any nature, readily marketable assets other than bank stock in an amount not less than 12 per centum of the aggregate par value of all bank stocks controlled by such holding company affiliate, which amount shall be increased by not less than 2 per centum per annum of such aggregate par value until such assets shall amount to 25 per centum of the aggregate par value of such bank stocks; and (2) shall reinvest in readily marketable assets other than bank stock all net earnings over and above 6 per centum per annum on the book value of its own shares outstanding until such assets shall amount to such 25 per centum of the aggregate par value of all bank stocks controlled by it;

“(c) Notwithstanding the foregoing provisions of this section, after five years after the enactment of the Banking Act of 1933, (1) any such holding company affiliate the shareholders or members of which shall be individually and severally liable in proportion to the number of shares of such holding company affiliate held by them respectively, in addition to amounts invested therein, for all statutory liability imposed on such holding company affiliate by reason of its control of shares of stock of banks, shall be required only to establish and maintain out of net earnings

over and above 6 per centum per annum on the book value of its own shares outstanding a reserve of readily marketable assets in an amount of not less than 12 per centum of the aggregate par value of bank stocks controlled by it, and (2) the assets required by this section to be possessed by such holding company affiliate may be used by it for replacement of capital in banks affiliated with it and for losses incurred in such banks, but any deficiency in such assets resulting from such use shall be made up within such period as the Board of Governors of the Federal Reserve System may by regulation prescribe and the provisions of this subsection, instead of subsection (b), shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock;

“(d) Every officer, director, agent, and employee of every such holding company affiliate shall be subject to the same penalties for false entries in any book, report, or statement of such holding company affiliate as are applicable to officers, directors, agents, and employees of member banks under section 5209 of the Revised Statutes, as amended (U. S. C., title 12, sec. 592); and

“(e) Every such holding company affiliate shall, in its application for such voting permit, (1) show that it does not own, control, or have any interest in, and is not participating in the management or direction of, any corporation, business trust, association, or other similar organization formed for the purpose of, or engaged principally in, the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, debentures, notes, or other securities of any sort (hereinafter referred to as ‘securities company’); (2) agree that during the period that the permit remains in force it will not acquire any ownership, control, or interest in any such securities company or participate in the management or direction thereof; (3) agree that if, at the time

of filing the application for such permit, it owns, controls, or has an interest in, or is participating in the management or direction of, any such securities company, it will, within five years after the filing of such application, divest itself of its ownership, control, and interest in such securities company and will cease participating in the management or direction thereof, and will not thereafter, during the period that the permit remains in force, acquire any further ownership, control, or interest in any such securities company or participate in the management or direction thereof; and (4) agree that thenceforth it will declare dividends only out of actual net earnings.

“If at any time it shall appear to the Board of Governors of the Federal Reserve System that any holding company affiliate has violated any of the provisions of the Banking Act of 1933 or of any agreement made pursuant to this section, the Board of Governors of the Federal Reserve System may, in its discretion, revoke any such voting permit after giving sixty days’ notice by registered mail of its intention to the holding company affiliate and affording it an opportunity to be heard. Whenever the Board of Governors of the Federal Reserve System shall have revoked any such voting permit, no national bank whose stock is controlled by the holding company affiliate whose permit is so revoked shall receive deposits of public moneys of the United States, nor shall any such national bank pay any further dividend to such holding company affiliate upon any shares of such bank controlled by such holding company affiliate.

“Whenever the Board of Governors of the Federal Reserve System shall have revoked any voting permit as hereinbefore provided, the rights, privileges, and franchises of any or all national banks the stock of which is controlled by such holding company affiliate shall, in the discretion of the Board of Governors of the Federal Reserve System, be subject to forfeiture in accordance with section 2 of the Federal Reserve Act, as amended.”

REPLY BRIEF FOR APPELLANT

**IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA**

No. 9338

PEOPLES BANK,

Appellant,

—v.—

**MARRINER E. ECCLES, RONALD RANSOM, M. S. SZYMCAK,
JOHN K. MCKEE, ERNEST A. DRAPER and RUDOLPH M.
EVANS,**

Appellees.

**APPEAL FROM FINAL ORDER OF DISMISSAL OF
THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.**

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*United States Court of Appeals
for the District of Columbia*

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EVANS,

Appellees.

APPELLANT'S REPLY BRIEF

General Observations.

Counsel for appellees are to be complimented on presenting an able apology for conduct which the defendants have practically admitted was beyond their legal authority. But their brief is more impressive as a diversion than as a justification. Before finally facing the only real issue,—illegality of administrative action—the defendants have pleaded almost every defense of confession and avoidance in the books.

First, they have sought to remove the whole controversy from the realm of judicial decision—by their claim of non-justiciability. Failing that, they have pleaded “estoppel”. Faced with the necessity of pointing out the fundamental elements of estoppel and failing to find them, they now,

for the first time, claim "waiver". Apparently recognizing the weakness of that unpleaded claim, particularly in the face of undisputed evidence that it was *they*, and not the plaintiff, who concealed material facts (e.g., the secret agreement for non-insurance) at the time of the alleged waiver, they argue that it is not necessary for the court to look at the statute because a "presumption of validity" attaches to administrative actions. Then, reminded that the alleged "presumption of *validity*" is not that at all, but is only a "presumption of *regularity*", and applies only to conduct within the limits of legal authorization, they have retreated behind the claim that "judgment and discretion" are involved and that the court should not question or interfere with their administrative omniscience.

Finally, perhaps recalling that plaintiff's fundamental premise in this lawsuit is that the law has withheld from the defendants any right to exercise discretion on the real subject matter of Condition No. 4, defendants have reluctantly devoted nine pages (pp. 32-41) in the last point of their brief to a statement of why they now claim the condition is valid. Even then they have attempted to goad the plaintiff into an argument as to the "soundness" of Transamerica Corporation, a question which we suspect that corporation would gladly argue with them at any appropriate time or place, but which is utterly immaterial under Condition No. 4. Defendants seem most reluctant to direct argument to the only real issue, viz., whether defendants had power under law to declare a post-admission forfeiture of Reserve membership because of the appearance of a disapproved minority stockholder. Defendants appear to hope that this Court will miss the point that no statute has authorized them to say, out of hand and in advance, who shall not own any interest in a member bank.

Defendants' extraordinary efforts to distract the court's attention from the real issue, as well as the "imponderable" character of their final reluctant defense on the merits, invite further analysis. In this reply brief, however, we shall attempt to confine ourselves to answering the new points urged in appellees' brief without repetition of the arguments presented in appellant's main brief. The principal new points are: (1) Defendants' misconception of the subject matter of the controversy; (2) alleged non-justiciability of the controversy; (3) defendants' attempt, first, to substitute an unpleaded claim of "waiver" for the defense of "estoppel", which was the basis of the decision in the court below, and, second, to rehabilitate the "estoppel" defense by a claim, now presented for the first time, that plaintiff concealed "a hidden determination" at the time of its admission to Reserve membership; (4) defendants' attempt to divert attention from their admissions in the record as to plaintiff's qualifications for Reserve membership and as to the favorable determination thereof by the defendants; (5) the so-called "presumption of validity"; (6) defendants' effort to divert the court's attention from the expressions of Congressional intent made in connection with the 1927 amendment to the Federal Reserve Act by reference to discussions of another proposed amendment which was *not* adopted; (7) defendants' misconstruction of Congressional intent in authorizing conditions of membership; (8) defendants' misapplication of the doctrine of implied power; and (9) defendants' erroneous argument that plaintiff could have protected itself against violation of Condition No. 4 by adoption of a restrictive by-law.

I.

Defendants have misconceived the subject matter of the controversy.

The real issue: Do the applicable statutes give defendants power to declare forfeiture of Reserve membership and insurance of deposits without evidence of mismanagement, unsoundness or other factors prescribed by the statutes, and without hearing or opportunity to correct allegedly unsound practices?

We are concerned solely with circumstances that, according to Condition No. 4, may work a forfeiture of the membership and insured status of the plaintiff bank—nothing else. These circumstances may be found only in the condition, the regulation and the law. Let us see what they say.

The condition says that if, without prior written approval of the Board of Governors, Transamerica Corporation or any holding company affiliate acquires "any interest in such bank [the plaintiff] * * * such bank, within 60 days after written notice from the Board of Governors * * * shall withdraw from membership in the Federal Reserve System." A combination of two circumstances, and only two, will work a breach of this condition: first, the acquisition by the black-listed purchaser of an interest in the bank (any interest) without written approval of the Board; and second, failure to withdraw upon notice. That is all there is to the condition. It says not one word about management, not one word about bank operations, nothing about other business activities of its shareholders, nothing about capital, and nothing about soundness. Thus a mere reading of the condition shows the falsity of defendants' premise (Appellees' Br., p. 36) that the legitimate purpose of the condition was to guard against the eventuality "that an applicant's

'management' might come under the control of a company, the banking policies of which it [the Board] felt to be unsound * * *."

Now, what does the regulation say? Code of Federal Regulations, Title 12, Chapter II, Part 208, Section 208.7 says:

"Every state bank while a member of the Federal Reserve System—* * *

"(c) Shall comply at all times with any and all conditions of membership prescribed by the Board in connection with the admission of such bank to membership in the Federal Reserve System."

That is all there is to the regulation as it relates to this condition,—not a word about management or the persistence of any other quality that assures a sound bank, but the failure to comply with any prescribed condition is *a breach of the regulation*.

Next, what does the statute say? Section 9 of the Federal Reserve Act, as amended, paragraph 8 (12 U. S. C. §327; Appellant's Stat. App. p. A-11), says that if at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section "or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto" it shall be within the power of the Board, after hearing, to require the bank to surrender its stock and forfeit all rights and privileges of membership.

There we have it. The picture is complete. An administrative gibbet is constructed upon which the plaintiff bank can be hanged as high as Haman "at any time" the defendants decide to open the death cell. There need be no hearing of any sort at which any question of the bank's management or soundness need be explored as germane to any issue. The

facts to establish a breach would be completely developed by the introduction of the stock transfer record of the bank, testimony of absence of written approval, and the mere absence from the record of any voluntary withdrawal.

After the defendants had constructed a device of this character there would seem to be a certain emptiness in counsel's statements (Appellees' Br. p. 6) that "the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto"; that considerations of public interest would determine when, if ever, the condition need be enforced; that the failure of the Board "thus far to take any action under the condition, *even though now justified by the facts*, is conclusive proof that the Board did not prejudge the matter at the time the condition was agreed upon." (Italics ours.) Do counsel mean to say that the Board did not prejudge the effect of the acquisition of an interest in the plaintiff bank by Transamerica Corporation without its written approval? A rereading of the condition is recommended. It is submitted that no candid mind can read the condition, the Board's regulation and the statute and conclude that there is any discretion remaining. The trap can be sprung at any time, regardless of the condition of the bank.

If the Board should act tomorrow on the facts which counsel say "now justify action", there would be no need of any evidence relating to Transamerica Corporation except proof of the bare fact that it had acquired an interest in the bank without the Board's written approval. Doubtless the argument then would be advanced in support of removal of plaintiff bank that the decision of the Board was directly within the condition and is not judicially reviewable. In such an event the fact that Transamerica Corporation had contributed to the building up of the largest bank in the world; that it had a long record in the field of banking that is not marred by the loss of any money by any depositor;

that the state in which it has been most active went through the greatest general banking crisis in history and partly on account of its operations maintained the lowest record of bank suspensions from 1921 to 1936 of any state between the Pacific Ocean and New York City, with the lone exception of Delaware (Federal Reserve Bulletin, Vol. 23 (1937), page 1220), would be ruled out by counsel as utterly irrelevant.

If the plaintiff bank in these circumstances should even attempt to show by the twelve year experience of the Federal Deposit Insurance Corporation that the concern of the Board for the obligations of the Insurance Corporation (Appellees' Br. p. 28) is baseless or inconsistent with realities, this likewise would doubtless be ruled out as not within the condition. By utilizing the highest available authority and weighing the dangers of the future to the Federal Deposit Insurance Corporation by the experience of the past as shown by the actual figures contained in its official annual report for December 31, 1945, covering all the disbursements of that corporation for the protection of depositors in the twelve years of its history, we might offer to prove (Table 119 p. 142 of such report) that of the \$261,717,000 aggregate disbursements for such purpose only \$861,000 had been disbursed in California during the whole period—and that to but one national bank—even though California ranks second of all the states in the Union in banking resources. We might further offer to prove by the same table that during the same period \$79,240,000 was so disbursed in New Jersey, \$67,556,000 in New York and \$47,484,000 in Pennsylvania—all of them states with very large banking resources. But we seriously doubt that this actual experience would avail to dispel the abiding fear which the defendants now profess and which is so obviously misplaced. We have no doubt that the contention would be made that such facts are irrelevant to the issue as to a breach of the condition, and such contention would be obviously correct.

The real issue is the validity of the condition as prescribed, and the defendants have not met it.

II.

The Controversy is Justiciable.

Appellees' principal authorities on justiciable controversy, as well as a recent decision of this Court, support the opinion of Mr. Justice Holtzoff and our contention.

Keeping in mind the real nature of the controversy, and laying aside controversies feigned by the defendants, the carefully reasoned and exhaustive opinion of Justice Holtzoff in the court below (App. 11-23) clearly demonstrates that the case is justiciable, and we would be content to submit this phase of the case on that opinion alone. However, defendants' primary reliance on the obstructive defense of non-justiciability (Appellees' Br., Point I) seems to call for a brief discussion of the principal authorities relied upon by them.

The first case cited as supporting this previously overruled contention of the defendants is *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936). At page 7 of the brief it is said that "among other relief, plaintiff sought a declaratory judgment concerning the validity of certain policies previously determined by the Tennessee Valley Authority" and then follows a quotation which it is said "significantly" stated the reasons for "refusing to render such a decision."

We may accept counsel's contention that mere pronouncements, policies and programs of administrative agencies do not give rise in themselves to justiciable controversies, and we are agreed that when they have fruition in action of a definite and concrete character which constitutes a threatened interference with the rights of the person complaining they

may well give rise to such a controversy. This, in fact, is well illustrated in the *Ashwander* opinion by the sentence immediately preceding that quoted by counsel. In defining "the scope of the issue" the court there said (297 U. S. at p. 324) :

"We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934."

That contract was regarded by the court as action of a concrete character which constituted an actual or threatened interference with the rights of the person complaining and was examined as such. It is, however, no more definite or concrete as applied to the persons seeking declaratory relief in that case than Condition No. 4 is definite and concrete as applied to the appellant in the instant case. The court in the *Ashwander* case in determining the validity of the contract went to greater lengths than it is necessary to go in this case and ruled on the constitutionality of the act pursuant to which the contract was made, whereas here the invalidity of the condition may be determined by examining the statutory powers of the Board. The case is clear and strong authority in support of our contention that a justiciable controversy is presented.

The case of *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995 (S. D. Cal. C. D., 1940), also supports our contention rather than that of defendants. The petition asked for a declaration that the plaintiff was not subject to the provisions of the Fair Labor Standards Act. Because service in the jurisdiction could not be made upon the defendant Administrator, the complaint was dismissed for lack of jurisdiction over an indispensable party. The opinion of Judge Yankwich contains an excellent discussion of what constitutes a justiciable controversy and, without quoting at length from that opinion, we would like to call the attention of the court to the following brief extract (30 F. Supp., at p. 1008) :

"* * * I can conceive no good reason for not relieving a citizen of a threat of official action resulting from his relation to a governmental agency.

"A declaration of non-liability as applied to such a relationship is, if at all, more important in these days of expansion of governmental frontiers, than a similar declaration as to contractual relations."

The decision of the District Court in California in *Peoples Bank v. Federal Reserve Bank of San Francisco, et al*, 58 F. Supp. 25, likewise does not help defendants here. Defendants are not so brash in their brief as to contend that the California decision is *res judicata*, although footnote 6 on page 9 of Appellees' Brief leaves it open to the Court to infer as much. Personal jurisdiction of the present defendants was neither sought nor obtained in the California case. The Board of Governors was sued only as an entity. It was given an opportunity, which it declined to embrace, to state its position with respect to plaintiff's continued relation with the Federal Reserve Bank. Apart from the question of "justiciable controversy", there were five other grounds for the motion to dismiss in California. The "justiciable controversy" question was discussed in that case only as it bore upon the claim asserted against the Federal Reserve Bank of San Francisco.

The California federal court held, at the special insistence of counsel appearing for the Board of Governors, that the individual members of the Board (who have been sued as defendants here) were indispensable parties defendant and could be sued only in the District of Columbia. The court therefore dismissed as to the Board of Governors (sued as an entity). Any comments of the court upon the existence of a justiciable controversy were pure *obiter dicta*; were made only with respect to the defendant Federal Reserve Bank of San Francisco which, as the court stated, was a mere "subaltern without authority" (58 F. Supp., at

p. 30) which had "never taken any position with regard to the validity of the condition", and had "not attempted to and does not intend in the future to attempt to enforce the condition", and which "prior to this suit * * * had never received from plaintiff any complaint regarding the condition or its imposition" (58 F. Supp., at p. 29). Thus it appears that the statements quoted by defendants were made by the California court without knowledge of the facts—certainly without knowledge of the *present* facts alleged in the complaint and affidavits here with respect to these defendants and in entirely different circumstances—and should be disregarded by this Court.

Defendants subtly suggest (Appellees' Br., p. 7) that "where, as here, *governmental policy* is attacked in an action for declaratory relief," some extra factor, not required in actions between private citizens, is necessary to render the controversy "justiciable". The cases do not so hold. This Court, in accord with the authorities, has very recently upheld the propriety of declaratory relief in a suit against a government agency in a case in which the implied "threat of official action harmful to the plaintiff" was less direct, less imminent, and less disastrous than that shown by this record. *Arkansas Power & Light Co. v. Federal Power Commission*, 156 F. 2d 821 (decided June 28, 1946). In the course of a learned majority opinion, Mr. Justice Miller of this Court made the following comments which are particularly apposite in the instant situation (156 F. 2d, at p. 832):

"Nothing hypothetical appears here; on the contrary the dispute is real and substantial and admits of specific relief through a decree adjudicating the scope of the power of each commission under the factual situation disclosed. Under these principles governing the application of the Declaratory Judgment Act, in view of the nature of the controversy shown by the record, we have no doubt that the judicial function may be appropriately exercised. * * *

"It is peculiarly appropriate to invoke the Declaratory Judgment Act when one is uncertain of his rights and may suffer disastrous consequences if he were forced to await the hostile move of an adversary. It is generally agreed by bench and bar that, in providing a remedy to one thus unfortunately situated because of uncertainty as to the nature of his rights, the enactment of the Declaratory Judgment Act was a progressive move, and that the statute is a useful piece of legislation, leading to an early determination of actual disputes, avoiding expensive multiplication of litigation, and making it unnecessary for him who is uncertain as to his legal status to gamble for stakes in the form of substantial penalties should his guess be wrong."

The future cannot throw any additional light upon the question presented for determination in this action: Is Condition No. 4 valid or invalid? Do the defendants under the law have a right to specify particular persons as ineligible to hold stock in a state member bank or do they not? The effort on the part of the defendants to treat the question as one involving "control" or "management" or "banking policy" is merely a tactic of diversion. None of those words will be found in Condition No. 4. The purchase by Transamerica Corporation of one share of plaintiff's stock violated Condition No. 4 just as completely as would the purchase by Transamerica of 100% of plaintiff's stock. The justiciable controversy relates to the question whether the condition is valid.

As for defendants' amazing suggestion (Appellees' Br., p. 10) that plaintiff has failed to "show a threat of official action harmful to the plaintiff", surely the court may assume that a great government agency would not impose such a condition without a serious purpose to enforce it. What more is needed than the condition and its breach? How-

ever, we respectfully refer the court to the additional threat contained in the language of the Board's letter announcing the approval of plaintiff's membership application on May 6, 1942 (Exhibit 12, App. 58-61, especially note first paragraph, p. 60),—a threat which was repeated and reemphasized by the letter written by the defendant Eccles to Mr. A. P. Giannini on November 13, 1942 (Exhibit 19, App. 82-85); again by the Board's official decision to ignore the formal demand made on December 4, 1945 for cancellation of Condition No. 4 (Complaint, par. XIV, App. 7); again by the resolution formally adopted by the Board of Governors on January 28, 1946, which was predicated upon the assumed validity of Condition No. 4 and the intention of the defendants to enforce it at will (App. 10-11), and finally by the defendants' vigorous assertion in this proceeding that Condition No. 4 is valid, that action under it is "now justified by the facts" (Appellees' Br., p. 6), and that the defendants have an alleged statutory right, by means of the condition, to deprive plaintiff of its Reserve membership and deposit insurance whenever they deem it desirable to do so. It cannot be denied that these threats are presently "harmful to the plaintiff" and will continue to be so until declaration of their validity or invalidity is judicially made. The seriousness of the impending harm is alleged in the complaint (par. XIV, App. 7) and strongly supported by the affidavits of Mr. Brewer, the president, and Mr. Luddy, a director of the plaintiff (App. 106-110).

Can these defendants or this Court doubt the existence of *present* damage? Since the allegations of the complaint are deemed true, there can be no legal question about it on this appeal. But apart from the technical sufficiency of the allegations, common sense demonstrates the inevitability of *present* damage.

Plaintiff is a relatively new bank, in a rapidly growing section of the country. Its present and continuing need of new capital for the proper expansion of its business must be

assumed. Yet who would wish to invest additional money in the capital stock of this bank, while it is subject to termination of its Reserve membership and its federal deposit insurance (with consequent double liability on stockholders—See Appellants' Br., p. 65) on sixty days' notice at the mere whim of six men who have imposed a restriction upon this bank which has never been imposed upon any other bank anywhere and compliance with which is completely beyond the power of the bank or its directors or stockholders to control? (See IX, *infra* p. 34). How can a bank, subject to such a condition, attract able men as new officers when its very existence may be terminated at any time? How do the bank's officers dare make normal banking commitments for banking premises, or facilities, or employment contracts, or loans, or investments? What explanation can a bank officer make to a depositor who hears of this condition and demands assurances of the bank's continuation of membership in the Federal Reserve System and the continued benefits of federal deposit insurance? How can a bank, subject to such a condition, be expected to compete on equal terms with other banks not subject to the condition?

As Mr. Justice Holtzoff stated, "to say that no actual controversy exists between the parties" as to Condition No. 4 "is not realistic." (App. 21.)

III.

Defendants' vacillation between the unpleaded claim of "waiver" and the pleaded defense of "estoppel" leaves both claims unestablished.

In successive sections of the brief for the appellees Condition No. 4 is portrayed in a variety of colors, each seeming to blend with the atmosphere most suited for the particular contention. We have already seen that when it is sought

to remove the condition altogether from judicial scrutiny as presenting no justiciable controversy, it pales into insignificance—it becomes a mere pronouncement, policy or program which is not within the judicial ken, not having had as yet, it is said, fruition in action of a definite or concrete character. It is a mere abstraction devoid of justiciable substance. However, even in this portion of the argument, with an obvious disregard for consistency, the careful reservation is made (Appellees' Br., p. 6) that though the Board has not yet taken action under the condition, action under it is "now justified by the facts." This inconsistency did not escape Justice Holtzoff.

Next it is said that the plaintiff, by assenting to this anemic (?) condition and therefore to its pronouncement as the policy and program of the Board, forever estopped itself to defend against the dire consequences of those policies, whether valid or not, as to the plaintiff. Thus the condition becomes no longer a mere lifeless expression of unilateral official idealism, but a solemn, virile contract, without warrant of authority on the official side but nevertheless sacrosanct as to the plaintiff. By assent to this expression, say the defendants, the plaintiff is "estopped". But since the essential elements of "estoppel" as elucidated by the best authority on the subject seem to be lacking, the defendants now prefer to meet the plaintiff's "challenge" by arguing that there is a "simple waiver" (Appellees' Br., p. 20) even though waiver is not pleaded. The defendants pleaded *estoppel*.

These twin herrings,—waiver and estoppel—are dragged in on the blanket assumption,—an unavoidable assumption—that there is not an iota of statutory law that authorizes any administrative agency so to effectuate and enforce its own preconceived economic ideas. But defendants have not yet offered any authoritative support for the theory that a bank may waive itself into oblivion by an agreement made

without knowledge on its part of material consequences deliberately planned and concealed by the other party to the transaction. It is now admitted by defendants that the agreement between them and the Federal Deposit Insurance Corporation permanently to deprive any bank such as the plaintiff, which might withdraw from Federal Reserve membership, of deposit insurance as well, constituted an "official" pronouncement of the Board of Governors (Appellees' Br., p. 28). Yet it is undisputed on this record that the existence of such agreement was concealed from the plaintiff bank not only at the time of its so-called "waiver" of its legal rights in May, 1942, but for a continuous period of nearly two years thereafter, until March, 1944, when, upon learning of the concealed agreement, plaintiff took immediate steps to obtain a declaration of the invalidity of the condition so imposed upon it.

Defendants' counsel appear to have no great confidence in their suggestion of "waiver" as a substitute for "estoppel", for they no sooner offer it than they leave it and attempt to rehabilitate the defense of "estoppel" by the ingenious suggestion (Appellees' Br., p. 21) that the essential element of misrepresentation is found in plaintiff's alleged concealment at the time of its acceptance of Condition No. 4 of "*an apparently hidden determination to contest the Board's authority to impose the condition if and when it should appear desirable to do so.*"

Defendants cite no reference to this record for any evidence of such "*an apparently hidden determination*" and this record contains none. Indeed, with typical inconsistency, defendants say, where they think it helpful to a different argument (Appellees' Br., p. 7), that difference of opinion between plaintiff and the Board "*apparently did not exist when the condition was agreed upon*". Moreover, this record shows plainly that between the date of plaintiff's acquiescence (May, 1942) and the date of plaintiff's com-

mencement of litigation (April, 1944) several important events transpired, any one of which was sufficient to bring about a new-found "determination to contest the Board's authority to impose the condition": *First*, the Bank acquired some new stockholders (App. 109, 6). *Second*, the Bank acquired at least one new director (App. 109). *Third*, the Board of Directors of the Bank at a meeting held on March 24, 1944 was advised, for the first time, of the non-insurance agreement which had been entered into between the defendants and the Federal Deposit Insurance Corporation two years earlier and before the imposition of Condition No. 4 (App. 107).

The defendants admit (Appellees' Br., p. 26) that up to the time this condition was imposed the existence of the policy therein disclosed as to Transamerica Corporation, Bank of America and holding companies generally *was unknown to the plaintiff*. They say "not one of those letters contains even the remotest reference to appellant, much less any indication of an alleged 'policy' of the banking agencies with respect to it." It might be added that it was apparently also unknown to the parties directly affected, for the letter which first announced it was dated the same day (February 14, 1942) as the letter denying the plaintiff's first application (App. 49, 69). Yet this policy, previously shrouded in utter darkness, becomes the pole star which illuminates the path pursued in silence by the three banking agencies until they had evolved a "central policy" respecting "Transamerica and its affiliated banks" (Appellees' Br., p. 27). Although the plaintiff bank has never been affiliated with Transamerica and is not so affiliated today, it is the only bank in the United States to which this so-called "central policy" has actually been so applied. And against plaintiff it has been applied by a purportedly binding arrangement which can readily result in plaintiff's destruction whenever the defendants elect,—*without regard*

to whether plaintiff ever becomes affiliated with Trans-america and without regard to the soundness of its operations.

Counsel argue that there is nothing contrary to public policy in the condition and rely upon the declaration to that effect in the opinion in the lower court (Appellees' Br., p. 4). In effect counsel and the lower court have said that, assuming the Board has no authority under the law to impose this requirement, it is just as effective now as though it did have the power for appellant has agreed to it.

So long as a vestige remains of the fundamental principle that ours is a government of laws rather than of men, it is inconceivable that public policy would sanction any device by which officials exercising only delegated authority might seek to insulate from the reach of the law *their* unauthorized action of an obviously oppressive character. Surely there are better uses for the doctrine of equitable estoppel! To give judicial support to such a contention is but to measure the success of administrative usurpation by the ingenuity displayed in making it seem tolerable in specific instances. *Nihil aliud potest rex quam quod de jure potest.*

Thus, analysis of the pleaded defense of "estoppel" (upon which the decision of dismissal was based in the court below) and the unpleaded substitute claim of "waiver" in this Court shows a complete absence of evidence to support either of such alleged defenses and the presence in abundance of proof of administrative deception calling, at the very least, for a judicial declaration of the rights of citizens imposed upon by an abuse of governmental power.

IV.

Defendants' pleading has admitted the plaintiff bank's specifically alleged qualifications for membership in the Federal Reserve System.

This Court can hardly be impressed by defendants' assertion (Appellees' Br., p. 22) that "the record shows that at the time of its application appellant was *not* qualified for membership" when the only supporting reference for this statement is to the fact that *in February, 1942*, the Board of Governors denied plaintiff's original application for membership. This was approximately two and a half months prior to the approval of the application *in May, 1942*. Certainly, defendants will not deny that they had power under law to *approve* plaintiff's application. Certainly, they cannot deny that they did approve it. It was their official duty in doing so to consider all factors which they were expressly required by the Federal Reserve Act to consider.

But we need not rely upon the presumption that defendants performed their official duty. Paragraph VII of the complaint (App. 4), which was admitted by silence in the defendants' answer, expressly alleged that "in considering and approving said application, the Board, as required by 12 U. S. C. §§ 322 and 264(e)(2) and (g), took into consideration the financial condition and history of the plaintiff, the general character of its management, whether or not the corporate powers exercised by it were consistent with the purposes of Chapter 3 of Title 12 of the United States Code, the adequacy of plaintiff's capital structure, its future earnings prospects and the convenience and needs of the community to be served, and found the plaintiff bank to be fully qualified and eligible for membership in the Federal Reserve System." This admitted allegation appears to have been overlooked by defendants when they suggested

(Appellees' Br., pp. 21-22) that the record does not justify our repeated assertion in our main brief that defendants have admitted the plaintiff bank's qualifications for membership in the Federal Reserve System, and when they say that "the basis upon which this assertion is made" is the admission by silence of the allegation in paragraph V of the complaint that "plaintiff, being in all respects qualified and eligible for membership in the Federal Reserve System * * *, made application", etc. Defendants urge that the last quoted allegation is "the grossest kind of conclusion of law" and therefore not admitted. Even if they are correct as to paragraph V, this is not material here in view of their admission of the clearly factual allegations of paragraph VII.

This admission by the defendants that they acted favorably upon the defendants' qualifications for admission to the Reserve System as specifically prescribed by the Federal Reserve Act is a most important fact in this case. Defendants' counsel refer to these qualifying factors as "imponderables"; the Board's appraisal of which should not be reviewed by the courts (Appellees' Br., p. 32). But this plaintiff bank is not seeking a court review of that appraisal; for it is admitted that the Board's appraisal was favorable to the plaintiff. Plaintiff was found qualified and admitted to membership.

A decision on the "imponderables" referred to by the defendants, whether made by them, by the Comptroller of the Currency or by the Federal Deposit Insurance Corporation, is exactly what it purports to be—a decision on admission, nothing more nor less. If favorable, a charter issues, the membership results or a bank is approved. That is what has happened with respect to the plaintiff—it is a member bank, just as a like decision by the Comptroller on application for a charter would have made it a national bank, a member bank and an insured bank all in one; or

a like decision by the Federal Deposit Insurance Corporation would have made it an insured bank.

One might readily infer from the defendants' argument that it is the function of the Board of Governors in considering the membership application of a state bank to anticipate all possible situations which may hazard the bank's future soundness and provide in advance for purging the System of it. Congress has not placed any such power in or burden upon the Board of Governors, any more than it has upon other banking agencies. Congress has not exacted such prescience—much less has it countenanced such ruthlessness. It has required the Board to deal with a concrete situation presented on an application and if any circumstances later arise which constitute a hazard to the soundness of the bank, whether by reason of the bank's falling under bad management or being victimized by unsound practices of any sort, Congress, in addition to the powers conferred upon the directors of the Federal Deposit Insurance Corporation, has been generous in bestowing upon the Board ample authority to bring about the removal of the management or effect other requisite corrections—and this without destroying the investment of shareholders. (See Appellant's Br., pp. 60, A-2 and A-23.) Since the defendants rely upon an implied power to impose this penal condition it is pertinent to inquire whether a power will be implied to impose a penalty more severe than those expressly imposed by statute for the same deficiency.

The statutes do not contemplate that one little bank may be utterly destroyed by a Federal supervisory authority on account of a fancied fault (unpreventable investment by a third party in a small minority of its stock), while other and much larger banks, with manifold potential hazard through exposure to the same "fault", shall continue to enjoy the benefits of membership and insurance. If a holding company were engaged in an "expansion" program

would it not seem ridiculous, as well as discriminatory, for such a small investment to be used as the excuse for penalizing a small state bank applying for membership, while existing national banks are permitted (?) to pass completely under the control of the same company?¹ To grant the soundness of counsel's argument, it seems to us, is not only to ignore the rationale of the remedial statutes but to lose all sense of proportion.

V.

There is no "presumption of validity". The "presumption of regularity" applies only to conduct within the limits of legal authorization.

One of the defendants' final efforts to persuade this Court to refrain from considering the scope of defendants' powers under the applicable statutes is found at page 31 of appellees' brief, where reliance is placed upon the "presumption of validity which attends the administrative exercise of a power expressly conferred by statute". It is significant that the first quotation set forth by defendants in support of this argument (Appellees' Br., p. 31) refers to "the presumption of *regularity*",—not to any "presumption of *validity*".

The cases cited by defendants all involved regularity of action within an admittedly authorized range of discretion,—not, as in this case, an attempt without colorable delegation by Congress, to usurp the legislative function of declaring public policy. In each of the cases it was emphasized that *no facts* were shown which would require a conclusion

1. An apt illustration is afforded in Transamerica Corporation's annual report for 1943, referred to at page 27 of the appellees' brief, wherein it appears that Transamerica Corporation acquired that year 80% of the common stock of the First National Bank of Lamanda Park, California, which bank was later made a branch of the First Trust and Savings Bank of Pasadena, a state member bank. The same report also shows the acquisition of a majority of the common stock in the First National Bank in Santa Ana and the First National Bank of Bellflower.

of irregularity and that the "presumption" was designed to protect government officers only against utterly groundless charges. In other words, even where the conduct is of a type to which the "presumption of regularity" may attach, the presumption supplies a basis for decision only in the total absence of a factual showing, and *when a fact appears*—even one fact which requires a conclusion of irregularity—the presumption disintegrates, and the burden of going forward with evidence to justify the challenged conduct is then shifted to the government officer.

Examination of the cases² cited by the defendants as authority for this presumption shows its complete inapplicability in the instant case. It is especially significant that in *Proctor & Gamble v. Coe*, 68 App. D. C. 246, 96 F. 2d 518, cited by defendants as authority for their presumption, this Court, stated a whole page of "tests (practically all applicable in the instant case), used to uphold the exercise of judicial restraint upon executive action under valid laws" (96 F. 2d, at pp. 521-522).

Defendants assert that there are no allegations of fact in the complaint sufficient to overcome the "presumption of validity", which as we have already shown is really a presumption of regularity which attends the performance of official acts. None of the cases cited, however, involved a situation like the one under consideration, where the validity of the official action is to be determined by comparing what was done with the authority granted in the statute. In each of these cases claims were made that officials had acted improperly but there was no claim that the acts done were *per se* beyond the power of the administrative officers involved. The claim, in each instance, was

2. *Klamath Indians, et al. v. United States*, 296 U. S. 244, 253; *United States v. Chemical Foundation*, 272 U. S. 1; *Lucking v. Delano*, 74 App. D. C. 134, 122 F. 2d. 21, 29; *Dunn v. Ickes*, 72 App. D. C. 325, 115 F. 2d 36, 37; *Proctor & Gamble v. Coe*, 68 App. D. C. 246, 96 F. 2d 518; *Putnam v. Ickes*, 64 App. D. C. 339, 78 F. 2d 223; *Twin City Milk Producers Assn. v. McNutt*, 122 F. 2d 564 (C. C. A., 8th).

that they were improper only if certain facts existed, and in each case it was held that the complaint failed to allege the necessary facts.

VI.

The quotation (Appellees' Br., pp. 39-40) of Congressional statements as to the reasons for rejecting an earlier and different proposed amendment of the Federal Reserve Act does not detract from the significance of the statements quoted in appellant's main brief (Point VI; Stat. App. pp. A-33 to A-39) respecting the amendment which became law.

The purpose of Congress to prevent such conditions was very clearly set forth in the committee hearings and the discussion in the Senate during the consideration of the McFadden Act in 1926. (See Point VI, Appellant's Br., p. 40, et seq.) Such purpose was then so understood by the Board. (Appellant's Br., pp. 42-43; Stat. App., pp. A-33 to A-39.) Although all of this is fully developed in our main brief, it is not even referred to—much less answered—by the defendants in discussing the McFadden Act at pages 38-41, inclusive, of their brief. According to the contentions of the defendants as we understand them, Congress accomplished nothing whatsoever by the amendment which *was adopted in 1927 over the opposition of the Board*. Of course Congressman McFadden testified against the amendment and no such amendment was contained in the bill as it passed the House. But Senator Glass and others pressed for the amendment *which was made in the Senate and later concurred in by the House*. It added to the existing law relative to admitting state banks the requirement that they be admitted "subject to *the provisions of this Act and to such conditions as it [the Board] may prescribe pursuant thereto*". The italicized words are the ones added by the amendment. Are they meaningless?

VII.

Congress authorized conditions of membership as a means of liberalizing the requirements to be met by state banks applying for reserve membership and not, as defendants argue, to make membership more onerous for state banks than for national banks.

Defendants state (Appellees' Br., p. 5) that in determining upon Condition No. 4 the Board acted in a perfectly routine manner. Since no such condition has ever been imposed upon any other bank (see Ponsford, App. 105), it is apparent that the imposition of Condition No. 4 was not only unusual and unique but constituted clear discrimination against the plaintiff.

Defendants also attempt an over-simplification of the problem when they state (Appellees' Br., p. 5) that the power to impose conditions was conferred upon the Board by Congress for the "obvious purpose of protecting the System against potentially unsafe and unsound banking situations". This is a most misleading generality.

The power to impose conditions was actually provided as a part of a legislative plan to liberalize the Federal Reserve Act so as to encourage the admission to the System of state banks which did not at the time of admission fully conform to the standards set for national banks. The inference, which defendants apparently would have the court draw, that conditions were authorized as a means of enabling the Board to prescribe a higher standard as to state banks than as to national banks, or to enable the Board to expel a state bank for a reason that would entail no disciplinary measures in the case of a national bank, would be a plain distortion and contradiction of the entire history of the Reserve Act. We challenge counsel to point out a single

instance in the legislative history of the Reserve Act in which the Congress has expressed an intention to permit a requirement that state banks, as applicants or as members, meet any higher standard of qualifications or banking practices than those laid down for national banks. In fact the statute expressly provides that higher capital requirements cannot be made (12 U. S. C. § 399(a)³), and it is expressly provided that all state banks shall have the same opportunity as national banks "to obtain and enjoy the benefits" of federal deposit insurance (12 U. S. C. § 264 (y)⁴).

The power to impose conditions of membership was first introduced into the Federal Reserve Act by Public Law No. 25 (65th Congress, approved June 21, 1917), 40 Stat. 232. Before the 1917 amendment, the Board was empowered to admit state banks to the System "under such rules and regulations as it may prescribe" and was not specifically empowered to impose any conditions of membership. It is hardly necessary to argue that the "rules and regulations" had to be uniform. The 1917 amendment changed Section 9 of the Act and permitted the Board to admit state banks to membership "subject to such conditions" as it might prescribe.⁵

Examination of the debates and the committee reports on the bills, which resulted in the 1917 amendment (H. R. 3673 and S. 1796, 65th Congress, 1st Session), does not substantiate defendants' statement. The committee reports and the statements made by Mr. Glass, who was then in the House and in charge of the bill, and by Mr. Owen, who was in charge of the bill in the Senate, indicate that there was strong resistance by banks, which were already subject to

3. Appellant's Stat. App. page A-13.

4. Appellant's Stat. App. pages A-5 to A-6.

5. It was because the Board was thought to have "usurped the powers of Congress" under this provision that a restrictive amendment was enacted in 1927. (See Appellant's Br., pp. 40-44 and this brief p. 24.)

state supervision, against subjecting themselves to Federal regulation as well, and show that the purpose of the amendment to Section 9 of the Federal Reserve Act was to *liberalize* the terms upon which state banks might be admitted to membership in the System and to induce more state banks than had hitherto deemed membership desirable to join and become members. *The terms of membership for state banks were to be more liberal than for national banks.* It gave them broader loan limits and permitted state banks "desiring" to withdraw to do so. (Cf. 12 U. S. C. §§ 84⁶ and 330⁷) (Congressional Record, vol. 55, p. 1154, et seq.; Congressional Record, vol. 55, p. 1581, et seq.; Senate Committee Report No. 11, 65th Congress, 1st Session; Report No. 35, House of Representatives, 65th Congress, 1st Session.)

Defendants' pretended worry about the need for protecting the System against potentially unsafe and unsound banking situations is shown by an examination of the statute to be wholly misplaced. Disciplinary provisions have been carefully made in the banking laws to afford this protection without need to rely upon conditions of membership, such as Condition No. 4, and without discrimination as between national and state member banks. For example:

12 U. S. C. § 264(i) (1)⁸ specifically provides for the forfeiture by insured banks of their insured status whenever the Board of Directors of the Federal Deposit Insurance Corporation find that such bank, after full opportunity for correction, has continued "unsafe and unsound practices", or for violations of law by its officers. But note that it is

6. R. S. § 5200; June 22, 1906, c. 3516, 34 Stat. 451; Sept. 24, 1918, c. 176, § 6, 40 Stat. 967; Oct. 22, 1919, c. 79, § 1, 41 Stat. 296; Feb. 25, 1927, c. 191, § 10, 44 Stat. 1229; May 20, 1933, c. 35, § 1, 48 Stat. 73; June 16, 1933, c. 89, § 26(a), 48 Stat. 191; Aug. 23, 1935, c. 614, § 321(b), 49 Stat. 713; June 11, 1942, c. 404, § 8, 56 Stat. 355.

7. Appellant's Stat. App., page A-14.

8. Appellant's Stat. App., page A-2.

the Federal Deposit Insurance Corporation,—not the Reserve Board—that is given power to compel such a forfeiture, and this is applicable to all insured banks, including member banks and national banks.

12 U. S. C. § 264(i)(2)⁹ provides that in case of the loss of insured status by a member bank, such member bank shall cease to be a member of the Federal Reserve System. Again note the responsibility rests with the Federal Deposit Insurance corporation and not with the Reserve Board.

12 U. S. C. § 301¹⁰ provides for the suspension by the Reserve Board of Reserve Bank credit facilities (but not membership) as to any state member bank making undue use of bank credit.

12 U. S. C. § 327¹¹ provides for the forfeiture of membership of banks failing to comply with the provisions of the statute prescribed for them or with the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto.

12 U. S. C. § 338¹² provides that if any holding company affiliate of a state member bank shall refuse to permit an examination of its affairs by the Board of Governors of the Federal Reserve System, or if the state member bank so affiliated shall refuse to pay the expense of such examination, the state member bank shall be expelled from the Federal Reserve System.

12 U. S. C. § 77¹³ provides for the removal of an officer or director (but not for expelling the bank) who is guilty of “unsafe or unsound practices” or violation of law, in the management of a national or state member bank, and for the imposition of a criminal penalty upon such director or officer if he thereafter participates in the management.

9. Appellant's Stat. App., page A-4.

10. Appellant's Stat. App., page A-30.

11. Appellant's Stat. App., page A-11.

12. Appellant's Stat. App., page A-19.

13. Appellant's Stat. App., pages A-23 to A-24.

These sections *are* obviously for the purpose of protecting the Insurance Corporation and the Reserve System against unsafe and unsound banking situations and also obviously afford such protection in ample form. In spite of that fact, and in spite of the loose and irresponsible suggestions of defendants' brief that unsound banking situations are involved here, the record does not indicate that any proceeding has ever been taken under any of these sections of the Banking Law nor that any of these sections has ever been invoked in any way by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or any other federal bank supervisory agency against any bank, whether national or state, affiliated with Transamerica Corporation or the Bank of America, nor against any bank which by any stretch of the imagination could be said to be a member of the "Transamerica group". (Cf. Andrews Affidavit, App. 62.)

If, as defendants say, they were of the opinion, in which opinion the Board of Directors of the Federal Deposit Insurance Corporation concurred, that Transamerica Corporation and the members of the "Transamerica group" were pursuing "unsafe and unsound banking practices", why was no such action taken? Why didn't they use the protection provided by Congress instead of attempting to distort another statutory provision which was expressly adopted to serve a different and even an inconsistent purpose?

The defendants' effort to find authorization for the enforcement of administrative discretion upon subjects and by methods not committed to them by Congress finds a parallel in another section of appellees' brief (p. 27) which calls for passing comment. Counsel have there set forth a misleading purported statistical compilation found in the speech of a Congressman printed in the Congressional Record. By use of such compilation, made up from material

taken out of its context in the files of the Board of Governors, by references in their brief to the "Transamerica empire" and to "predatory and monopolistic practices", and by the statement of the defendant Eccles (App. 84) that the Board "will consider as unsound their [Transamerica's] efforts to continue an expansion program", defendants doubtless hope to suggest to this Court that Condition No. 4 was created for the purpose of guarding against the creation of an unlawful monopoly. Since we have already demonstrated that the issues in controversy between Transamerica and the defendants are utterly irrelevant to the real issue here presented, and bear only on defendants' improper motives in imposing Condition No. 4, we restrain our impulse to set forth the true facts bearing upon defendants' irrelevant suggestions. However, it is appropriate to point out, first, that, as this record shows (App. 101, 102, 103), the defendants have appeared before Congress in an effort to procure an amendmnet to the Clayton Act which would give the Board of Governors authority to restrain such "expansion", and that Congress has not given it such authority; and, second, that the administrative agencies given authority under the Clayton Act, as it now stands, are required to exercise their powers of enforcement according to the terms of that act (15 U. S. C. §21; Act of Oct. 15, 1914, c. 323, §11; 38 Stat. 734 as subsequently amended). It requires a hearing at which evidence may be introduced; expressly provides that orders issued pursuant to such hearing shall be appealable to the courts at the instance of the parties adversely affected; and the agency is required to apply to the courts for enforcement. Have the defendants successfully persuaded the court below to grant them indirectly, through the condition of membership device, a means of exercising the power they have unsuccessfully sought from Congress by amendment to the Clayton Act, and without affording any judicial review?

Let this Court not be misled, as was the court below, by glib generalities and high-sounding phrases. The true statutory scheme must now be clear. Protection against unsound banking policies was indeed provided by the Congress through the provisions we have noted. But "conditions of membership" were designed as a means of enabling the Board of Governors to *lighten* its requirements where necessary to get additional banks into the System. The power to prescribe appropriate conditions of membership cannot be employed in the manner attempted here without perverting the power to uses that were clearly never intended. Implied powers are never found except to make effective an obvious unexpressed intention—never contrary to an obvious expressed intention which characterizes all the cognate legislation throughout a long history.

VIII.

Appellees' main authority on implied power (*Apfel v. Mellon*) is not in point. Implied powers to support Condition No. 4 are further negated in the instant case by the statute relied on by appellees.

Perhaps the strongest legal argument advanced in support of the legality of the condition is that based upon the decision of this Court in *Apfel v. Mellon*, 59 App. D. C. 94, 33 F. 2d 805. The court there sustained the action of the Federal Reserve Board in withholding its approval of articles of association of a corporation organized under the Edge Act (Sec. 25(a) of the Federal Reserve Act; 12 U. S. C. §614; 41 Stat. 378) for the purpose of engaging in international banking or foreign financial operations. Under that act the articles and an organization certificate were required to be filed with the Board and it was provided that the association should become a body corporate when the

Board "has approved the same and issued a permit to begin business." The court held (Appellees' Br., p. 33) that the Board would not be compelled to issue a permit inasmuch as the word "approval" imports the exercise of judgment and discretion and implies the power to disapprove and it appeared that the Board had taken into consideration the financial responsibility, experience, training and other qualifications of the sponsors to conduct the business successfully.

We do not question the soundness of that decision but we deem it clear that its principles are *not* applicable here. Every discretionary function that the Board exercises in admitting a state bank to membership in the System has been exercised here. The plaintiff bank has been found qualified and is admitted. Unlike the *Apfel* case, in which the applicant was found *not* qualified and the application was disapproved, the defendants here, while approving, have sought to impose a condition with respect to a state of facts which, though non-existent at the time, might possibly arise in the future and which, if it should arise, would have no bearing whatsoever either on the bank's continuing qualifications nor on its qualifications at the time it was admitted. If the statute permits the Board to exercise such power through the device of imposing conditions, it follows that the Board may exact of state banks conditions and penalties more rigorous than those to which national banks are subjected, and more rigorous than those specifically provided by statute for curing later deficiencies in capital, management, banking practices and the like. That the statute does not give the Board such authority is abundantly shown elsewhere in this and in our main brief.

A most interesting consideration of a contention of implied supervisory powers in the Interstate Commerce Commission, analogous in some ways to the situation here presented, is found in *Interstate Commerce Commission v. U. S.*

ex rel. Los Angeles, 280 U. S. 52, 74 L. Ed. 163. The court refused to imply the power invoked there, reversing the judgment of this court (34 F. 2d 228). The language of the Supreme Court (280 U. S. at pp. 69 and 70) is quite apropos.

A very apt illustration of lack of authority for Condition No. 4 is actually afforded by the argument of the defendants themselves at page 42 of their brief. Defendants there refer specifically to Section 5144 of the Revised Statutes¹⁴ as, "One facet of the Board's jurisdiction" (Appellees' Br., p. 42), and in footnote 22 they say: "While State member banks are not mentioned in Section 5144, they are required to secure an agreement from their holding company affiliates that the latter will be subject to the same conditions and limitations as prescribed in that section."

This requirement as to state member banks is found in 12 U. S. C. §337, which is the section of the Federal Reserve Act that deals with admission of state banks.¹⁵ It is made very clear from the language of that statute that state member banks and national banks are to be on an equal plane as members of the Reserve System. In its relation with a holding company affiliate, if it should ever have one, a state member bank must sustain the burden of obtaining from the affiliate an agreement that it "shall be subject to the *same conditions and limitations* as are applicable * * * in the case of holding company affiliates of national banks" and *not to conditions and limitations that cannot be made applicable in the case of holding company affiliates of national banks*. Thus the full quotation of the statute in this respect shows unmistakably excessive exercise of power in prescribing Condition No. 4.

No state bank can be removed from the Reserve System for inability to procure from its holding company affiliate,

14. This section is the same as 12 U. S. C. § 61 and had already been set forth in Appellant's Stat. App., pages A-24 to A-29.

15. Appellant's Stat. App., page A-18.

if it has one, assent to a condition or limitation upon its acquisition of additional stock since there is no such provision in Section 5144 of the Revised Statutes applicable to holding company affiliates of national banks. That being true as to an actual holding company affiliate, it is even more true as to a bank that as yet has no affiliate.

IX.

By-law remedy neither legal nor adequate.

It is suggested that the appellant should have adopted a by-law that would so restrict its shareholders as to meet the requirements of Condition No. 4. A text authority is cited in support of the suggestion which shows the authorities to be divided upon the validity of restrictive by-laws applicable to transfers of corporate stock in furtherance of some corporate policy. Obviously this is not an inviting prospect, especially when the nature of a by-law to meet the broad requirements of this condition is considered. They would not be met by a by-law which would merely restrict the transfer, for the condition restricts the acquisition, directly or indirectly, of any interest in such bank. It even purports expressly to require Bank of America or Trans-america to obtain the written consent of the Board before making any loan to any person for the purpose of acquiring bank stock if it should result in the acquisition of any interest in this bank. We do not know how or whether we could induce strangers so to conduct their business. It seems to us that this should come more properly within the jurisdiction of the Board if it has such power, for both are subject to its legal supervision.

We confess our inability to draft any by-law which would meet the requirements of this condition and still be valid according to any known authority. It must be remembered,

too, that the condition is much broader than the commitments the shareholders were required to sign preliminary to the admission of the bank to the System (App. 5S). This suggestion of counsel appears to be but a desperate afterthought.

The controversy is justiciable, as was determined by Justice Holtzoff. The decision of Justice Bailey should be in all respects reversed, and a declaratory judgment in favor of the plaintiff should be entered.

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Respectfully submitted,

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